1992

Tamera A. McDonald v. Robert M. McDonald : Brief of Appellant

Utah Court of Appeals

Suzanne Benson; McDonald, West & Benson; Attorney for Defendant/Appellant.
James Watts; Attorney for Plaintiff/Appellee; Edwin F. Guyon; Pro Se, Non-Party Judgment Creditor.

TAMERA A. McD

Plaintif

vs.

ROBERT M. McD

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APPEAL FROM A

THE

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DETERMINATIVE AUTHORITIES

(McDonald v. McDonald, Case No. 920313)

Rule 17, Utah Rules of Civil Procedure (Appendix, Exhibit S)

Shaw v. Jeppson, 239 P.2d 745 (Utah 1952) (Appendix, Exhibit N)

Rule 24, Utah Rules of Civil Procedure (Appendix, Exhibit T)

Albrechtsen v. Albrechtsen, 414 P.2d 970 (Utah 1966) (Appendix, Exhibit O)

COURT OF APPEALS

STATE OF UTAH

TAMERA A. McDONALD, Plaintiff/Appellee, vs. ROBERT M. McDONALD, Defendant/Appellant.	:	**BRIEF OF APPELLANT** Case No. 920313 Priority Number 16

APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT,

THE HONORABLE FRANK G. NOEL, PRESIDING

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LIST OF PARTIES

(A) Tamera A. McDonald, the named Plaintiff in this action.

(B) Robert M. McDonald, the named Defendant in this action.

(c) Although not a party to the action, Edwin F. Guyon has been designated as a judgment creditor in this action. The designation of a non-party as a judgment creditor is the issue which is the subject matter of this appeal.

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TABLE OF AUTHORITIES

CASES CITED

STATUTES AND RULES

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JURISDICTION OF THE COURT

This is an appeal from a final judgment entered by the Third Judicial District Court on May 7, 1992, in a domestic relations case. This Court has jurisdiction to hear this appeal pursuant to Utah Code Annotated § 78-2a-3(2)(h).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

1. Did the trial court err in granting judgment in favor of Edwin F. Guyon who is not a party to the action? Inasmuch as divorce actions are equitable proceedings, the Appellant Court should review the law and the facts to fashion its own remedy as a substitute for the judgment of the trial court. The trial court's action should be disturbed only to prevent manifest injustice. Penrose v. Penrose, 656 P.2d 1017 (Utah 1982); Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974). The authorities submitted by Defendant on this issue are as follows: Rule 17, Utah Rules of Civil Procedure; Shaw v. Jeppson, 239 P.2d (Utah 1952); Rule 24 Utah Rules of Civil Procedure; Albrechtsen v. Albrechtsen, 414 P.2d 970 (Utah 1966).

2. Did the trial court err in amending a judgment initially entered in favor of Plaintiff and subject to

offsetting judgments against Plaintiff without affording procedural due process of law? The standard of review is the same as stated in paragraph 1. The authorities submitted by Defendant on this issue are as follows: Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983); Gribble v. Gribble, 583 P.2d 64 (Utah 1978); Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984).

3. Did the trial court err in amending a judgment originally entered on October 30, 1991, after the time period specified in Rules 59(e) and 60(b), Utah Rules of Civil Procedure? The standard of review is the same as stated in paragraph 1. The authorities submitted by Defendant on this issue are as follows: Rules 59(e) and 60(b), Utah Rules of Civil Procedure.

4. Did the trial court abuse its discretion in entering the Subject Order on the basis of mistake? The standard for review is the same as stated in paragraph 1. The authority submitted by Defendant on this issue are as follows: Rule 60(b), Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

At the conclusion of the trial on March 28, 1991, the trial court granted judgment in favor of Plaintiff and against

Defendant in the sum of $7,500 for attorney's fees. This judgment was formally entered in a Decree of Divorce on October 30, 1991.[1] (Appendix, Exhibit E).

Judgments had previously been awarded in favor of Defendant and against Plaintiff on February 16, 1991, for $250 (R. 533, Appendix, Exhibit C) and on August 7, 1991, for $3,846 (R. 795, Appendix, Exhibit D).[2] Thus, Defendant had offsetting judgments of $4,096, reducing his obligations (exclusive of interest) from $7,500 to $3,404.[3] On May 7, 1992, without prior notice to Defendant, and without providing Defendant with notice and a right be heard, the trial court, sua sponte, issued a Memorandum Decision and Order (R. 1068-1070) (hereinafter "subject order") providing that the

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[1] After entry of the Decree on October 30, 1991, the parties entered into a stipulation to amend the visitation provisions of the Decree (R.955). Pursuant to the stipulation, an Amended Decree was entered on December 12, 1991. The Amended Decree had no effect on the judgment. The wording of both Decrees with respect to the judgment are identical. (R. 920, para. 14; R. 989, para. 14).

[2] In addition to the judgments already entered in favor of Defendant and against Plaintiff, there is currently pending a motion for an additional judgment (R. 1078) arising out of Plaintiff's refusal to abide by paragraph 13 of the Decree (R. 988 - 989) with respect to the payment of indebtedness to Mountain America Credit Union.

[3] If Defendant's Motion for Entry of Judgment noted in fn. 2 is granted, the judgment in favor of Plaintiff and against Defendant would be fully off set.

judgment previously entered in favor of Plaintiff was amended to provide judgment in favor of Edwin F. Guyon rather than the Plaintiff, thereby removing the judgment from the offsetting judgments in favor of Defendant and against Plaintiff. (A copy of the Subject Order is attached as Appendix Exhibit A).

Thereafter, Edwin Guyon sought to enforce the amended judgment against Defendant without any allowance for offsetting judgments previously entered in favor of Defendant.

SUMMARY OF ARGUMENT

1. The trial court erred in granting judgment in favor of Edwin Guyon who was not a party to the action.

2. The judgment in favor of Plaintiff, naming Edwin Guyon as the judgment creditor, was entered without notice to Defendant and without providing Defendant with an opportunity to be heard and deprived Defendant of the right to setoff in violation of procedural due process.

3. The amendment of the judgment in favor of Plaintiff, by naming Edwin Guyon as the judgment creditor, was untimely having been entered after the ten-day period prescribed in Rule 59(c), and after the three-month period stated in Rule 60(b), Utah Rules of Civil Procedure.

4. The trial court abused its discretion in entering a judgment in favor of Edwin Guyon on the basis of mistake.

STATEMENT OF FACTS RELEVANT TO ISSUES ON APPEAL

1. On March 28, 1991, at the conclusion of trial of this matter, the trial court orally announced its decision. Included in the court's decision was the following:

> With regard to attorney's fees, the Court finds there is a need on the part of Plaintiff for attorney's fees and awards attorney's fees in the amount of $7,500. (Tr. 9)

2. On October 30, 1991, the Court entered a final Decree of Divorce. Paragraph 14 of the Decree provided as follows:

> Plaintiff is awarded judgment against Defendant in the sum of Seven Thousand Five Hundred Dollars ($7,500) as attorney's fees. (Emphasis added). (R. 920, Appendix, Exhibit E).

3. Pursuant to a stipulation between the parties, an Amended Decree of Divorce was entered on December 12, 1991. Paragraph 14 of the Amended Decree of Divorce awarding Plaintiff judgment for attorney's fees incorporated the exact wording of the original Decree as quoted in the preceding paragraph. The specific wording of the Decree naming

Plaintiff as the judgment creditor was expressly approved by Plaintiff and her then attorney, James Watts. (R. 989, Appendix, Exhibit F).

4. Prior to the entry of either of the Decrees of Divorce, the trial court entered judgment in favor of Defendant and against Plaintiff on February 16, 1991, in the sum of $250 as a sanction for contempt of court arising out of Plaintiff's detention of the child in violation of a court order (R. 533, Appendix, Exhibit C).

5. Prior to the entry of either of the Decrees of Divorce, the trial court entered second judgment in favor of Defendant and against Plaintiff in the sum of $3,846 on August 7, 1991, as a sanction for contempt of court arising out of Plaintiff's detention of the child in violation of a court order (R. 795, Appendix, Exhibit D).

6. Prior to the entry of either Decrees of Divorce, Defendant filed a motion for an additional judgment in the sum of $7,000 against Plaintiff by reason of Plaintiff's refusal to pay indebtedness to Mountain America Credit Union (R. 1078-79).[4]

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[4] On December 17, 1991, the Court found that "it appears probable that said motion would be granted." (R. 1000, Appendix,

7. In September or October, 1991, Plaintiff terminated Edwin Guyon as her attorney (R. 1019, para. 7; R. 878). However, Mr. Guyon refused to formally withdraw as attorney for Plaintiff.

8. In November, 1991, after being terminated as Plaintiff's attorney, Edwin F. Guyon sought to execute on the judgment entered in favor of Plaintiff. Mr. Guyon obtained a Praecipe and Writ of Execution describing all property awarded to Defendant in the divorce decree. In response thereto, on November 25, 1991, Defendant filed a Motion to Quash Praecipe and Execution and Alternative Motion to Stay Enforcement of Praecipe and Execution (R. 933-34). On December 17, 1991, the trial court entered a temporary restraining order enjoining the sale of Defendant's property pursuant to the praecipe and execution (R. 999-1001). The Temporary Restraining Order stated:

> 1. The sale of Defendant's property purports to be based upon a judgment entered in favor of Plaintiff and against Defendant in the sum of $7,500.00, and Defendant appears to have valid setoffs against said judgment in the sum of $4,096.00 by reason of judgments

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Exhibit G). As of the date of the Notice of Appeal, no hearing has been held on said Motion.

> heretofore entered in favor of Defendant and against Plaintiff.
>
> 2. It appears that Plaintiff has failed and refused to comply with the prior order of the Court that she pay and discharge all indebtedness to Mountain America Credit Union secured by the 1988 Ford van and that such failure gives rise to a claim on the part of Defendant against Plaintiff in a sum in excess of $3,404.00, which would set-off and discharge the judgment upon the proposed sale is based.
>
> 3. Defendant has filed a motion for judgment against Plaintiff arising out of Plaintiff's failure to pay indebtedness to Mountain America Credit Union and it appears probable that said Motion would be granted. If such Motion were granted, the judgment of $7,500.00, upon which the proposed sale is based, would be fully paid and discharged. (R. 999-1000, Appendix, Exhibit G).

9. On January 16, 1992, the trial court issued a Minute Entry announcing its decision to quash the Praecipe and Execution. In the Minute Entry, the court stated:

> The court is of the opinion that this a judgment granted in favor of the Plaintiff. Plaintiff's counsel must look to Plaintiff for actual payment of his attorney's fees. . . . In any event the Court is of the opinion that Plaintiff's counsel must look to Plaintiff for payment of his fees and accordingly grants the Motion to Quash the Praecipe and Execution. (R. 1013-1014, Appendix, Exhibit H).

10. On February 7, 1992, the trial court entered Findings of Fact and Conclusions of Law and Order Quashing the Praecipe and Execution obtained by Edwin F. Guyon. In this regard, the Order entered by the trial court provided as follows:

> 1. Defendant's Motion to Quash Praecipe and Execution and to Stay Enforcement of Praecipe and Execution obtained by Plaintiff's former counsel, Mr. Edwin Guyon, is hereby ~~vacated~~ granted. Said Praecipe and Execution are quashed and are of no effect and enforcement of the same is stayed.
>
> 2. Plaintiff's former attorney, Edwin Guyon, must look directly to his client, Tamera A. McDonald, Plaintiff, for payment of his attorney's fees. (R. 1031-1032, Appendix, Exhibit I)

11. On May 7, 1992, without prior notice or hearing, the trial court suddenly reversed its position and entered the Subject Order in a Memorandum Decision wherein the trial court held as follows:

> The court is going to set aside that portion of the Decree that granted Plaintiff judgment for attorney's fees and is going to sua sponte order an amendment to the Decree which grants a judgment in favor of Plaintiff's counsel at the time, Mr. Edwin Guyon, in the sum of $7,500. (R. 1068-1070, Appendix, Exhibit A).

12. The Memorandum Decision of May 7, 1992, provides "This decision will serve as the order of the court" (R.1070). This is the Subject Order which is the focus of this appeal.[5]

ARGUMENT

POINT I.
THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF A NON-PARTY.

Rule 17, Utah Rules of Civil Procedure, provides that "every action shall be prosecuted in the name of the real party in interest."

In this action, Plaintiff engaged the services of Edwin Guyon to represent her in the action and she thereby incurred attorney's fees for his services. Accordingly, Plaintiff was

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[5] After Defendant filed his Notice of Appeal on May 13, 1992 (R. 1093), specifying the subject order of May 7, 1992, as the order being appealed, Mr. Guyon unilaterally prepared an "Amendment to Judgment" (hereinafter "judgment") dated July 2, 1992 (R. 1207, Appendix, Exhibit J). The judgment was executed by the trial court on July 15, 1992. Inasmuch as the "judgment" is contrary to the wording of the subject order of May 7, 1992 (which, among other things, expressly states "this decision will serve as the order of the Court") and inasmuch as the "judgment" was submitted in violation of Rule 4-504(1), Code of Judicial Administration (which requires judgments and orders to be submitted within 15 days of the ruling) (Appendix, Exhibit W), Defendant has regarded the "judgment" as invalid and superfluous. To the extent this Court regards the "judgment" as valid or effective, Defendant extends his appeal to include said "judgment."

directly liable to Edwin Guyon for such fees. If Mr. Guyon pursued claims for collection, his client, Plaintiff in this action, and was the party directly liable for the fees.

In paragraph 10 of her Complaint (R. 3), Plaintiff sought an order that Defendant "pay to Plaintiff" a reasonable sum for attorney's fees. At the conclusion of trial, the Court granted Plaintiff's prayer in that regard. There was no suggestion in the pleadings that Plaintiff's attorney was directly seeking judgment against Defendant for attorney's fees. Mr. Guyon never filed a complaint in intervention or otherwise assert any basis for a claim of attorney's fees directly against Defendant.

One of the purposes for the requirement of Rule 17, that an action be prosecuted in the name of the real party in interest, is to permit the Defendant to assert all defenses and counterclaims against the real owner of the cause. Shaw v. Jeppson, 239 P.2d 745 (Utah 1952). Defendant respectfully submits that it is grossly unfair to allow a person not subject to offsetting judgments to "stand in" for the real party in interest who is so liable in order to circumvent the offsetting judgments. Moreover, under the Shaw decision, such a procedure violates the purpose of Rule 17.

As previously noted herein, at the time of the Subject Order on May 7, 1991, which purported to change the identity of the judgment creditor from Plaintiff to Edwin Guyon, Defendant had judgments against Plaintiff in the sum of $4,096, with a pending motion for an additional judgment of $7,000 which the trial court found would likely be granted thereby totally offsetting Plaintiff's judgment (R. 1000)[6]. The subject order circumvented offsetting judgments and claims which Defendant had against Plaintiff.

Apart from the inherent injustice in circumventing Defendant's offsetting judgments, the decision of the Utah Supreme Court in Albrechtsen v. Albrechtsen, 414 P.2d 970 (Utah 1966), expressly prohibits Edwin Guyon from directly enforcing a judgment entered in favor of Plaintiff or obtaining a judgment in his own name in the absence of a complaint in intervention.

A person not a party to an action who seeks relief or believes his interests will be adversely affected by an adjudication in an action must file a motion seeking leave to file a complaint in intervention thereby allowing the adverse

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[6] The right to setoff judgments is well established - 47 Am. Jur. 2d, Judgments, §§ 999-1002 (Appendix, Exhibit X).

party notice of his claims and an opportunity to be heard with respect to the claims. Rule 24, Utah Rules of Civil Procedure; Albrechtsen v. Albrechtsen, 414 P. 2d 970 (Utah 1966).

At no time prior to the entry of the subject order did Edwin Guyon seek leave to file a complaint in intervention nor did he file any such complaint. Accordingly, not being a party to the action, Defendant had no notice of his claims, if any claims he had, for direct judgment. Moreover, Edwin Guyon, not being a party or intervener in the action, was not entitled to present his "claims" to the trial court or obtain a judgment in his favor against Defendant. On the basis of the above argument and authorities, the Subject Order should be reversed.

POINT II.

THE AMENDMENT OF THE JUDGMENT WITHOUT NOTICE OR HEARING DEPRIVED DEFENDANT OF PROPERTY WITHOUT DUE PROCESS OF LAW.

At no time prior to the entry of the Subject Order was Defendant given any notice or right to be heard on the issue of whether the judgment should be amended or a new judgment entered in favor of Edwin Guyon rather than Plaintiff. It is readily apparent that Defendant had a vital interest in such

decision inasmuch as the amendment, or new judgment, deprived him of his right of offset with respect to judgments previously entered in his favor and against Plaintiff. The trial court acknowledged in the text of the Subject Order that such order was entered without prior notice as a sua sponte order.

The only motion before the trial court at the time of the entry of the Subject Order was the "Motion For Stay Of Entry Of Order and To Set Aside Judgment re Attorney's Fees" filed on January 28, 1992 (hereinafter "Motion To Set Aside") (A copy of the Motion To Set Aside is attached as Appendix, Exhibit B). The Subject Order recited that it was entered pursuant to this Motion To Set Aside. However, the Motion to Set Aside made no claim that the prior judgment in favor of Plaintiff should be amended to name Edwin Guyon as the judgment creditor nor did the motion otherwise give notice of any relief that would circumvent Defendant's offsetting judgments. On the contrary, in the text of the Motion, Edwin Guyon expressly acknowledged that the judgment was properly entered in favor of Plaintiff and that "Plaintiff is entitled to enforce the judgment." (R. 1018, Appendix, Exhibit B).

Thus, at no time prior to the entry of the Subject Order did Defendant have notice or opportunity to be heard to argue the unfairness of changing the identity of the judgment creditor to a person not subject to offsetting judgments and claims. To the extent of the offsetting judgments and claims, Defendant was deprived of property without due process of law.

In Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983), the Utah Supreme Court held:

> Timely and adequate notice and opportunity to be heard in a meaningful way are the very heart of procedural fairness . . . .
>
> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.
>
> Many cases have held that where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him or not given sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process. Accord, Gribble v. Gribble, 583 P.2d 64 (Utah 1978); Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984).

The Subject Order should be reversed inasmuch as it was entered without affording Defendant procedural due process of law.

POINT III.

THE TRIAL COURT ERRED IN AMENDING THE JUDGMENT AFTER THE TIME PERIODS SPECIFIED IN RULES 59 and 60, UTAH RULES OF CIVIL PROCEDURE.

A. RULE 59(e)

Rule 59(e), Utah Rules of Civil Procedure, provides as follows:

> A motion to alter or amend the judgment shall be served not later than ten days after entry of judgment.

The Subject Order violates the terms and provisions of Rule 59(e). At no time prior to the entry of the Subject Order was any motion or other notice given to Defendant that such amendment was contemplated or considered. Moreover, if the subject order is not considered as a new judgment entered without notice or right to be heard, it must be construed as an amendment to the judgment originally entered on October 30, 1991. In such case, the amendment was made 189 days after the original judgment.

At some point, the litigating parties must be able to rely on the certainty of a final judgment. In the instant case, by reason of prior rulings of the trial court, Defendant's belief that the matters relating to judgments and offsets had been finally determined had been affirmed and reaffirmed.

Defendant respectfully submits that a procedure allowing amendments to judgments 189 days after the judgment is entered opens the door to chaos and confusion with respect to finality of litigation and violates the provisions of Rule 59(e).

B. RULE 60(b)

The Subject Order recited that it was entered pursuant to a "Motion For Stay Of Entry Of Order And To Set Aside Judgment re attorney's fees" (hereinafter "Motion To Set Aside") (Appendix, Exhibit B). The referenced Motion To Set Aside was filed by Edwin Guyon on January 28, 1992. Although the Motion To Set Aside was filed within the time limits specified in Rule 60(b), said Motion did not even suggest that the judgment should be amended to name Edwin Guyon as the judgment creditor. On the contrary, the Motion To Set Aside expressly acknowledged that the judgment for attorney's fees should be in favor of Plaintiff and "Plaintiff is entitled to enforce

the judgment" (Appendix, Exhibit B, p. 1018, para. 4). Thus, on the date of the Subject Order, no motion requesting the relief granted in the Subject Order had been filed. This circumstance was apparently acknowledged by the trial court when it noted that the Subject Order was entered sua sponte. Thus, the amendment of the judgment naming Edwin Guyon as the judgment creditor was not made within the three-month time period stated in Rule 60(b).

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION IN ENTERING THE SUBJECT ORDER ON THE BASIS OF MISTAKE.

According to the terms of the Subject Order, the entry of judgment in favor of Edwin Guyon was made to correct a mistake in originally entering judgment in favor of Plaintiff rather than Edwin Guyon. The rationale of "mistake" is contrary to all facts and circumstances surrounding the entry of the original judgment in favor of Plaintiff. First, after entry of the judgment in favor of Plaintiff, the trial court considered and reconsidered the precise issue of Edwin Guyon's rights to enforce the judgment for his direct benefit. On these occasions the trial court reaffirmed that the judgment was in favor of Plaintiff, not Edwin Guyon, and subject to

offsetting judgments and claims of Defendant. (See Temporary Restraining Order, R. 999-1000, Appendix, Exhibit G; Minute Entry R. 1013-1014, Appendix, Exhibit H; Order Quashing Praecipe and Execution, R. 1031-1032, Appendix, Exhibit I). Second, if a mistake had been made in not entering judgment in favor of Edwin Guyon, it is readily apparent that Edwin Guyon would promptly notified the court of the mistake. No such notice was ever given to the court. In this regard, on April 8, 1992, Defendant submitted a proposed Decree to the trial court (R. 581-589). Paragraph 14 of the proposed Decree (R. 587) provided as follows:

> Defendant shall pay to Plaintiff for the use and benefit of her attorney, the sum of Seven Thousand Five Hundred Dollars ($7,500). Said obligation shall be discharged by installment payments in accordance with an agreement between Defendant and Plaintiff's attorney and execution shall be stayed so long as payments are made in accordance with the agreement or subsequent court order. In the event Defendant and Plaintiff's attorney are unable to agree, the court shall, after hearing, establish an installment payment schedule.

On August 20, 1991, Edwin Guyon filed objections to the proposed decree submitted by Defendant. (R. 797-800, Appendix, Exhibit K). Mr. Guyon's objections to paragraph 14 of the proposed decree made no reference to any mistake in

ordering that the payments be made "to Plaintiff." On the contrary, Edwin Guyon's objections expressly demanded that judgment be entered in favor of Plaintiff. Edwin Guyon's objections to paragraph 14 of the proposed Decree were as follows:

> Attorney fees are a matter of judgment, not agreement, defendant's obligation is a matter of judgment, not agreement and, in the event no agreement is reached, plaintiff is entitled to enforce judgment. (Emphasis added).

Edwin Guyon's objections were accepted resulting in the wording of paragraph 14 of the final Decree awarding judgment to Plaintiff.

Inasmuch as there was no mistake in entering the judgment in favor of Plaintiff rather than Edwin Guyon, the rationale for the Subject Order is invalid.

On the basis of the foregoing, the Subject Order should be reversed.

CONCLUSION

Defendant respectfully submits that an element of chaos would be imposed in the judicial system if courts are permitted to grant judgments in favor of persons whom are not parties to the action, in favor of persons who the judgment

creditor did not even realize was his adversary, and without notice or opportunity to be heard in the matter. Moreover, the procedure followed in this action imposes substantial uncertainty with respect to the finality of judgments.

The Subject Order should be reversed so that the original judgment in favor of Plaintiff, and subject to setoffs and pending claims, would be reinstated as the measure of Defendant's liability.

DATED this 5th day of October, 1992.

Suzanne Benson
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, a true and accurate copy of the foregoing Brief of Appellant this 5th day of October, 1992, to the following:

Edwin F. Guyon
Attorney for Plaintiff
P.O. Box 17697
Salt Lake City, UT 84117

James I. Watts
124 South 600 East #100
Salt Lake City, UT 84102

APPENDIX TO APPELLANT'S BRIEF

Exhibit A: Memorandum Decision (Subject Order) dated May 7, 1992

Exhibit B: Motion For Stay of Entry of Order and To Set Aside Judgment re Attorney's fees

Exhibit C: Order and Judgment of February 16, 1991

Exhibit D: Order and Judgment of August 7, 1991

Exhibit E: Decree of Divorce dated October 30, 1991

Exhibit F: Amended Decree of Divorce dated December 12, 1991

Exhibit G: Temporary Restraining Order dated December 17, 1991

Exhibit H: Minute Entry dated January 16, 1992

Exhibit I: Order dated February 7, 1992

Exhibit J: Amendment to Judgment dated July 15, 1992

Exhibit K: Objections to Proposed Findings and Judgment

Exhibit L: Copy of Penrose v. Penrose, 656 P.2d 1017 (Utah 1982)

Exhibit M: Copy of Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974)

Exhibit N: Copy of Shaw v. Jeppson, 239 P.2d (Utah 1952)

Exhibit O: Copy of Albrechtsen v. Albrechtsen, 414 P.2d 970 (Utah 1966)

Exhibit P: Copy of Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983)

Exhibit Q: Copy of Gribble v. Gribble, 583 P.2d 64 (Utah 1978)

Exhibit R: Copy of Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984)

Exhibit S: Copy of Rule 17, U.R.C.P.

Exhibit T: Copy of Rule 24, U.R.C.P.

Exhibit U: Copy of Rule 59, U.R.C.P.

Exhibit V: Copy of Rule 60, U.R.C.P.

Exhibit W: Copy of Rule 4-504, Code of Judicial Administration

Exhibit X: Copy of 47 Am. Jur. 2d, Judgments §§ 999-1002

Tab A

EXHIBIT A

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TAMERA MCDONALD,	:	MEMORANDUM DECISION
Plaintiff,	:	Civil No. 894901447 DA
vs.	:	JUDGE FRANK G. NOEL
ROBERT MCDONALD,	:	
Defendant.	:	

The Court notes that there is now before it a "Motion for Stay of Entry of Order and to Set Aside Judgment RE: Attorneys Fees," filed by Mr. Edward F. Guyon, and defendant's "Motion to Dismiss the Motion of Ed Guyon Dated the 25th day of January, 1992 to Set Aside Judgment and Stay Entry of Order and Motion to Enter Order Consistent with the Court's Minute Entry." The Court has reviewed the entire history regarding this "Attorney's Fees" matter and now enters an Order disposing of these motions and resolving the issue of plaintiff's attorneys fees. The Court previously entered a minute entry dated the 16th day of January, 1992 indicating that Mr. Guyon should look to plaintiff for payment of his attorneys fees. That opinion was based on the precise wording of the Decree of Divorce which stated:

"Plaintiff is awarded judgment against defendant in the sum of $7,500.00 (Seven Thousand Five Hundred Dollars) as attorneys fees."

The Court is of the opinion that the precise wording of the Decree required that result. Mr. Guyon has now filed a Motion to Set Aside that judgment relating to attorneys fees relying on Rule 60 Utah Rules of Civil Procedure. After reviewing this entire matter, including portions of the Court transcript cited by the parties, and the Court's notes together with the Court's recollection of this matter, the Court is the opinion that Mr. Guyon's Motion is well taken. It was and is the Court's intent that Mr. Guyon be given a judgment for attorneys fees for services rendered up to the time of the Court's order awarding attorneys fees. The technical language that finally emerged in this matter (although the specific issue here presented was not addressed earlier) granted the judgment in favor of plaintiff rather than to Mr. Guyon.

The Court is going to set aside that portion of the Decree that granted plaintiff judgment for attorneys fees and is going to sua sponte order an amendment to the Decree which grants a judgment in favor of plaintiff's Counsel at the time, Mr. Edwin Guyon, in the amount of $7,500.00.

The Court urged the parties to try to work out an arrangement for payment of attorneys fees. Mr. Guyon was willing to accept monthly payments as the Court specifically

recalls during a colloquy between defense Counsel and Mr. Guyon during hearings before the Court, and the Court continues to encourage the parties to work out a payment arrangement but if that is not possible then it appears to the Court that Mr. Guyon would be entitled to collect on his judgment for attorneys fees as provided by law.

This decision will serve as the order of the Court.

IT IS SO ORDERED.

DATED this 1st day of May, 1992.

FRANK G. NOEL
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE COUNTY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 7 day of May, 1992:

Edwin F. Guyon
Attorney for Plaintiff
433 South 400 East
Salt Lake City, Utah 84111

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Jenni Olson

Tab B

EXHIBIT B

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counsel for plaintiff
Post Office Box 17697
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THIRD DISTRICT COURT, SALT LAKE COUNTY, UTAH

TAMERA A. McDONALD

plaintiff

vs.

ROBERT M. McDONALD

defendant

MOTION FOR STAY OF ENTRY OF ORDER and TO SET ASIDE JUDGMENT re ATTORNEY FEES

case no. 894901477 - DA
Judge Frank G. Noel

Plaintiff moves the court for an order staying the entry of the proposed order and findings of fact forwarded to the court by counsel for defendant on the 22nd day of January, 1992; and, further, moves the court for an order, pursuant to the provisions of Rule 60, Utah Rules of Civil Procedure, setting aside the judgement herein entered as it relates to attorney fees and in support thereof would show the court the following:

1. On March 28, 1991 the court, in making oral findings, conclusions and orders regarding attorney fees stated:

> With regard to attorney's fees, the Court finds that there is a need on the part of the plaintiff for attorney's fees and awards attorney's fees in the amount of seventy-five hundred dollars. . . . March 28, 1991 transcript, page 9, lines 12 to 15.

2. At the March 28, 1991 hearing above referenced the following conversation occurred as a result of defendant's counsel indicating that Mr. McDonald had some tax problems which prevented him from borrowing money, to take care of this obligation. [trans., p. 14, lines 21 and 22]:

> Mr. Guyon: I agree with that, Your Honor. If it places a cash flow burden on Mr. McDonald to pay

those, I think we need to work some program out.

The Court: Work out some payment. How much can he pay a month on the attorney's fees? Let me ask you this first. How long will it take to come up with the $2,000 in Cash settlement?

Mr. Richman: That is something that can be arranged within thirty days. . . .

The Court: How much per month on the attorney's fees?

Mr. Richman: Could we get with Mr. Guyon on that in the next few days?

Mr. Guyon: Yeah.

The Court: Try and work that out.

Mr. Guyon Have no gripes about working with him on that issue. trans., p. 14, line 23 to p. 15, line 20. [emphasis added]

3. On April 8, 1991, and based upon the findings, conclusions and orders rendered during the proceedings concluded March 28, 1991, counsel for defendant forwarded to counsel for plaintiff proposed findings of fact and conclusions of law and proposed decree of divorce which contain the following references to the payment of attorney fees:

> Plaintiff requested alimony from Defendant and payment of her attorney's fees. Findings of Fact and Conclusions of Law, paragraph 6, page 2. . . .
>
> Defendant should be required to pay to Plaintiff, for the use and benefit of Plaintiff's attorney, the sum of Seven Thousand Five Hundred Dollars ($7,500.00). By reason of the financial condition of Defendant, said sum should not be immediately due and payable. Said sum should be paid in accordance with an agreement with Defendant and Plaintiff's attorney. In the event Defendant and Plaintiff's attorney are unable to agree as to a payment schedule, said matter should be submitted to the Court for further determination. Execution should be stayed so long as payments are made in accordance with the aforesaid agreement or subsequent order of the Court. Findings of Fact and Conclusions of Law, paragraph 19, pages 14 and 15. [emphasis added]

> Defendant shall pay to Plaintiff for the use and benefit of her attorney, the sum of Seven Thousand Five Hundred Dollars ($7,500.00). Said obligation shall be discharged by installment payments in accordance with an agreement between Defendant and Plaintiff's attorney and execution shall be stayed so long as payments are made in accordance with the agreement or subsequent court order. In the event Defendant and Plaintiff's attorney are unable to agree, the Court shall, after hearing, establish an installment payment schedule. Decree of Divorce, paragraph 14, page 7. [emphasis added]

4. On August 16, 1991 plaintiff filed her objections to the proposed findings and judgment above referenced, in relevant part as follows:

> Objection to conclusions: page 14, paragraph 19; lines 1ff - Statements regarding payment of attorney fees are wholly without regard to representations by plaintiff's counsel (see transcript, page 14, lines 23 to 25 and page 15, lines 1 to 20). The purpose of plaintiff's agreement regarding fees was made as a courtesy, convenience and benefit to defendant, not to change the terms and conditions of the judgment nor to permit defendant to unilaterally determine what he wasted as payment schedules. . . .
>
> Objections to decree: 6. page 7, paragraph 14, lines 1ff - Attorney fees are a matter of judgment, not agreement, defendant's obligation is a matter of judgment, not agreement and, in the event no agreement is reached, plaintiff is entitled to enforce judgment.

5. The court, in a memorandum decision dated October 9, 1991, ruled upon the above referenced objections to proposed findings and judgment as follows:

> Objections to conclusions of law: Plaintiff's objection to paragraph 14; 19; 1 et. seq. is sustained.
>
> Objections to decree: 6. The Court sustains plaintiff's objections.

6. The Court, also in its memorandum decision dated October 9, 1991, included the following instruction:

> Counsel for defendant is to prepare new Findings of Fact, Conclusions of Law and a Decree consistent with this decision, submit them to opposing

counsel for approval as to form and then to the Court for signature.

7. At some time subsequent to October 9, 1991 Edwin F. Guyon was informed by plaintiff that she was in the process of seeking other counsel and that she anticipated that it would be J.I. Watts of Salt Lake City.

8. On October 21, 1991 Edwin F. Guyon, as counsel for plaintiff, forwarded to counsel for defendant a letter indicating that he had received no information regarding the new findings of fact, conclusions of law and judgment as directed by the court on October 9, 1991. A copy of said letter is attached hereto and made a part hereof for all purposes labeled exhibit A.

9. On October 25, 1991 Mr. Richman in response to the above letter (exhibit A) forwarded to Edwin F. Guyon a letter indicating that Mr. Watts had filed an appearance in the case and that he was dealing with him (Mr. Watts). A copy of said letter is attached hereto and made a part hereof for all purposes labeled exhibit B.

10. On October 26, 1991, in response to the above letter (exhibit B) Edwin F. Guyon forwarded a letter to Mr. Richman. A copy of said letter is attached hereto and made a part hereof for all purposes labeled exhibit C.

11. On or about November 15, 1991 Edwin F. Guyon, in response to a call to the clerk of the court regarding the docket sheet in the instant matter, was advised that findings, conclusions and judgment had been entered on October 9, 1991.

12. At no time prior to entry of said findings, conclusions and decree above referenced did Glen M. Richman comply

with the memorandum decision of the court dated October 9, 1991, which states:

> Counsel for defendant is to prepare new Findings of Fact, Conclusions of Law and a Decree consistent with this decision, submit them to opposing counsel for approval as to form and then to the Court for signature.

13. By Minute entry of the court dated January 16, 1992 Edwin F. Guyon, as counsel for plaintiff, was first informed that the precise wording of the Decree of Divorce pertaining to attorneys fees had been altered from the form indicated in the earlier proposed orders to read as follows:

> Plaintiff is awarded judgment against defendant in the sum of $7,500.00 (Seven thousand five hundred dollars) as attorneys fees.

14. At no time prior to the receipt of the above referenced minute entry dated January 16, 1992 was Edwin F. Guyon, counsel for plaintiff, informed of the alteration of the provision in the decree related to attorney fees, nor did Glen M. Richman notify, either orally or in writing of the alternation of the terms of said decree provision.

Wherefore defendant moves the court for an order setting aside the portions of the October 99, 1991 judgment as it relates to attorney fees and staying the entry of any order thereto relating until a hearing on the instant motion is had.

Dated the 25th day of January, 1992.

By: _____
Edwin F. Guyon, counsel for plaintiff

I certify that on the above date a copy of the foregoing was mailed, first class, postage prepaid to Glen M. Richman, Esq., 60 South 600 East, #100, Salt Lake City, Utah, 84102 and James I. Watts, Esq., 124 South 600 East, #100, Salt Lake City, Utah, 84102.

Edwin F. Guyon
Counsellor at Law

433 South 400 East
Salt Lake City, Utah 84111
8011355-8811
Fax 8011531-9355

October 21, 1991

Glen M. Richman, Esq.
60 south 600 East, #100
Salt Lake City, Utah 84102

RE: McDonald v. McDonald

Inasmuch as I have not heard from you regarding the preparation of new findings of fact, conclusions of law and Judgment as directed by Judge Noel in his memorandum decision of October 9, 1991, I wish to notify you that, unless payment in full of the amounts awarded as attorney fees are made prior to November 1, 1991, I will cause execution to issue to obtain such funds from your client.

Thank you for your attention to this matter.

Kindest regards.

Edwin F. Guyon

EG/me

cc J.I. Watts, Esq.

EXHIBIT A

RICHMAN & RICHMAN
ATTORNEYS AT LAW

Glen M. Richman

Barbara W. Richman
(of counsel)

60 South 600 East, Suite 100
Salt Lake City, Utah 84102
(801) 532-8844
FAX (801) 596-8285

October 25, 1991

Edwin F. Guyon, Esq.
433 South 400 East
Salt Lake City, 84111

Re: McDonald v. McDonald

Dear Mr. Guyon:

I received your letter dated October 21, 1991, on October 22, 1991 regarding the McDonald matter and your intention to execute against my client's assets to collect your attorney's fees for your representation of Tamera McDonald.

I have passed the content of your letter onto Mr. McDonald. I will be in touch with you regarding his reply.

I have been dealing with Mr. Watts on this matter since he entered an appearance in the case. He related to me that you have refused to file a withdrawal. If you feel I should be dealing with you on the case, please advise and let me see something from one of you signed by Tamera McDonald stating which of you represents her.

Sincerely yours,

RICHMAN & RICHMAN

Glen M Richman

GLEN M. RICHMAN
Attorney at Law

GMR:ll

cc: Robert M. McDonald
James Watts

EXHIBIT B

001023

Edwin F. Guyon
Counsellor at Law

433 South 400 East
Salt Lake City, Utah 84111
801/355-8811
Fax 801/534-9355

October 26, 1991

Glen M. Richman, Esq.
60 South 600 East, #100
Salt Lake City, Utah 84102

RE: McDonald v. McDonald

I read with great surprise your letter of October 25, 1991. Please be advised that I am counsel of record and, unless and until you are advised otherwise by me, will remain so.

I believe the rules specify that, in the event a party is represented by more than one attorney, you are obligated to provide notice of your activities to both.

To the extent that you have communicated with other counsel without notifying me, please forward to me any and all documents involved in such communication and inform me (in writing) of the time, date and content of any oral communications with Mr. Watts to which I was not a party.

Thank you for your attention to this matter.

Kindest regards.

Edwin F. Guyon

EG/me

cc J.I. Watts, Esq.

Glen M. Richman, Esq. (2752)
RICHMAN & RICHMAN
Attorney for Defendant
60 South 600 East, Suite 100
Salt Lake City, Utah 84102
Telephone: (801) 532-8844

IN THE THIRD DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TAMERA A. McDONALD,	**MOTION TO DISMISS THE MOTION OF ED GUYON DATED THE 25TH DAY OF JANUARY, 1992 TO SET ASIDE JUDGMENT AND STAY ENTRY OF ORDER AND MOTION TO ENTER ORDER CONSISTENT WITH THE COURT'S MINUTE ENTRY**
Plaintiff,	
vs.	**Civil No. 89-4901447 DA**
ROBERT M. McDONALD,	**Judge Frank G. Noel**
Defendant.	

Defendant, through counsel, moves the Court to dismiss the motion of Mr. Ed Guyon as above referred to for the following reasons:

1. Mr. Ed Guyon has no standing before the Court on the issue of attorney's fees awarded to Plaintiff

2. Mr. Guyon cannot act on behalf of Plaintiff because he does not represent her.

3. Said motion as it purports to be brought under Rule 60 of the Utah Rules of Civil Procedure is premature and inappropriate as it may relate to an order that is not entered.

4. If Mr. Guyon's motion under Rule 60 (b) relates to the Decree itself, it is without merit and pertains to a matter upon which the Court has ruled and has sustained its ruling as shown by the Court's Minute Entry dated the 16th day of January, 1992. The Decree that has carried the language upon which the Court has ruled was reviewed by Mr. Guyon over a considerable period of time; it was a decree to which he made numerous objections, but at no time did he make objections to the language with which he now disagrees.

5. Defendant requests the Court to enter the Findings and Order submitted herewith.

6. This Motion to Dismiss will be supported by a Memorandum of Points and Authorities.

DATED this 4th day of February, 1992.

RICHMAN & RICHMAN

GLEN M. RICHMAN
Attorney for Defendant

CERTIFICATE OF MAILING AND HAND DELIVERY

STATE OF UTAH)
)ss.
COUNTY OF SALT LAKE)

Leora Loy, being first duly sworn, deposes and says as follows:

She is a secretary in the law firm of RICHMAN & RICHMAN, attorneys for Defendant herein.

That she served the attached Motion to Dismiss the Motion of Ed Guyon dated January 25, 1992, upon Plaintiff by placing a copy in an envelope addressed to:

James I. Watts, Esq.
124 South 600 East, Suite 100
Salt Lake City, Utah 84102

and

Edwin F. Guyon, Esq.
433 South 400 East
Salt Lake City, Utah 84111

and depositing the same, sealed with first class postage prepaid thereon in the United States mail at Salt Lake City, Utah on the 5TH day of February, 1992 and also hand delivering the same.

Leora Loy
Leora Loy

SUBSCRIBED AND SWORN to before me this 5TH day of February, 1992.

NOTARY PUBLIC
GLEN M RICHMAN
60 So 600 East #100
Salt Lake City, UT 84102
My Comm Expires 8-10-93
State of Utah

Glen M Richman
NOTARY PUBLIC
Residing at Salt Lake County, Utah

My Commission Expires:
8-10-93

001027

Tab C

EXHIBIT C

Glen M. Richman, Esq. (2752)
RICHMAN & RICHMAN
Attorney for Defendant
60 South 600 East, Suite 100
Salt Lake City, Utah 84102
Telephone: (801) 532-8844

IN THE THIRD DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TAMERA A. McDONALD, Plaintiff,	ORDER AND JUDGMENT
vs.	2163555 2-21-91 8:31 am.
ROBERT M. McDONALD, Defendant.	Civil No. 89-4901447 DA
	Judge Frank G. Noel

The above matter came on for hearing before the Court, the Honorable Judge Frank G. Noel in his courtroom on the 17th day of January, 1991 pursuant to the defendant's Motion for Contempt, Sanctions and Fees and defendant's Motion for an independent mental and psychological Examination under Rule 35 of the Utah Rules of Civil Procedure.

The plaintiff moved the Court to continue the hearing on contempt on the basis that the plaintiff who resides in Denver, Colorado, planned to arrive in Salt Lake on the 18th of January; is employed in Denver and unable to reschedule her travel arrangements or rearrange her work schedule to participate in the hearing without substantial expense.

The plaintiff, through her attorney, objected to the motion under Rule 35 as not conforming to said Rule.

The Court heard arguments of counsel and denied plaintiff's motion to continue the hearing on contempt; denied plaintiff's objection to the defendant's motion under Rule 35 of the Utah Rules of Civil Procedure; granted defendant's motion for an independent mental and psychological examination of the plaintiff by Dr. Ralph Gant at the expense of the defendant.

The Court further ordered that defendant's counsel communicate with Dr. Ralph Gant as to the scope, time, place, manner and conditions of the examination to be done and report to the Court so that those items may be included in the Court's Order.

The Court found that there was good cause shown for the independent examination.

The Court then heard testimony concerning the matters of contempt, fees and sanctions and heard argument of counsel; found the plaintiff in contempt of the Court's order and imposed sanctions.

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's motion to continue the hearing on contempt is denied.

2. Plaintiff's objection to the motion of defendant for an independent mental and psychological examination under Rule 35 of the Utah Rules of Civil Procedure is denied.

3. Defendant's motion for an independent mental and psychological examination of the plaintiff by Dr. Ralph Gant is granted. Defendant, through his counsel, is to report to the Court the time, place, manner, conditions and scope of the examination to be done after communicating with Dr. Ralph Gant, and a report thereof to be filed with the Court and counsel for the plaintiff.

4. The Court finds plaintiff in contempt of the Court's order regarding visitation by not bringing the child home at the scheduled time on the 23rd of December, 1990; by picking the child up earlier than scheduled on January 3, 1991; by bringing the child back two days later than scheduled on January 9, 1991; by failing to let the defendant know the flight the child was to be on and the time the flight would arrive, and not delivering the child to the defendant as soon as possible after arrival on her flight on the 23rd of December, 1990.

5. The Court imposes as a sanction, a sentence upon the plaintiff to serve five (5) days in the Salt Lake County jail; withholds execution of the sentence and allows the plaintiff to purge herself of the contempt by abiding strictly to the Court orders, requires a report to be made by the end of January, 1991 of

the visitation scheduled for the weekend of the 18th of January, 1991; requires further that the next visitation period on the first weekend of February shall also be reported to the Court. Said reports of visitation shall be prepared by counsel for defendant and forwarded to the Court.

6. The Court further awards judgment against the plaintiff in favor of defendant for the use and benefit of his attorney; fees in the sum of $250.00.

7. The Court has previously ordered that an evaluation be made concerning the use of alcohol or drugs of each of the parties to determine if treatment is needed, and if so to recommend a program for the appropriate party or for one or each of the parties if required; withholding a determination as to payment of the expenses thereof for further hearing until after the evaluation and recommendation is made; ordered the parties to submit names of those who could be chosen to do the evaluation. Each of the parties through counsel have submitted three names. The Court restates that order and will make a determination as to an evaluator and will inform the parties through counsel, whereupon each of the parties is ordered forthwith, within a reasonable time, to make an appointment and to complete the evaluation.

8. This matter is set for a first place setting for final trial of the remaining issues on the 25th day of March, 1991,

beginning at 10:00 a.m. Anticipated trial time is three days, March 25, 26 and 27, 1991.

9. The mental and psychological examination of plaintiff shall be completed in accordance with the following:

a. Time: The examination is to be on either the 15th or the 18th of February, beginning at the hour of 1:00 p.m., and will last approximately seven (7) hours, or until completed. The choice of those dates should be made known to Dr. Gant's office as soon as possible, and no later than the next five (5) days.

b. Manner: The manner of the examination will be in the form of clinical interviews and objective and subjective psychological testing, including the Minnesota Multi-Phasic Personality Inventory.

c. The conditions and place of the examination. The examination will occur in the office of Dr. Ralph Gant at 716 East 4500 South, Suite N 150, Salt Lake City, Utah 84107; telephone number 263-1103.

d. Scope: The scope of the examination shall be an assessment of intellectual functioning; an assessment of personality functioning as/and evidenced by history and examination of dissociative process. A written report will be prepared.

e. Person conducting the examination: The examination will be conducted by Dr. Ralph Gant, a licensed psychologist.

DATED this 16 day of February, 1991.

BY THE COURT:

FRANK G. NOEL
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

EDWIN F. GUYON
Attorney for Plaintiff

CERTIFICATE OF HAND DELIVERY

Glen M. Richman certifies that he served the attached Order and Judgment upon plaintiff by placing a copy in an envelope addressed to:

Edwin F. Guyon, Esq.
433 South 400 East
Salt Lake City, Utah 84111

and hand delivering the same this 18th day of January, 1991.

RICHMAN & RICHMAN

GLEN M. RICHMAN
Attorney for Defendant

Tab D

EXHIBIT D

Glen M. Richman (2752)
Attorney for Defendant
60 South 600 East, Suite 100
Salt Lake City, UT 84102
Telephone: (801) 532-8844

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TAMERA A. McDONALD,	:	216672 8-14-91-808am.
Plaintiff,	:	ORDER AND JUDGMENT
vs.	:	
		Civil No. 89-4901447
ROBERT M. McDONALD,	:	
		Judge Frank G. Noel
Defendant.	:	

Hearing on the Order to Show Cause heretofore entered by the Court on Monday, July 15, 1991, was held before the Honorable Frank Noel, District Judge, on Monday, July 29, 1991. Present at said hearing were Plaintiff and her attorney Edwin F. Guyon and Defendant and his attorney Glen M. Richman. The Court having heard the evidence presented by the parties and being fully advised in the premises, and having heretofore entered its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The second segment of summer visitation as specified in the decision announced by the Court at conclusion of trial is hereby forfeited and canceled and Plaintiff shall have no right to visit the child for all or any portion of the second three-week segment of summer visitation.

2. Plaintiff shall retain all other visitation rights as provided by the decision of the Court at the conclusion of the trial of this matter and which shall be more particularly stated in the Decree of Divorce. Provided, however, that such visitation shall be subject to strict supervision for a period of three (3) months. The identity supervisor shall be based upon the recommendations of Dr. Mercedes Riesinger, the child custody evaluator appointed by the Court in this action. The requirements with respect to the supervised visitation shall be stated in a separate order.

3. As a sanction for contempt of Court, judgment is hereby entered for and on behalf of Defendant, Robert M. McDonald, and against Plaintiff, Tamera A. McDonald, in a sum of $3,846.00. Said judgment shall hereafter bear interest at the rate of twelve percent (12%) per annum.

DATED this 7 day of ~~July~~ August, 1991.

BY THE COURT:

HONORABLE FRANK G. NOEL
THIRD DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of ~~July~~ August, 1991, I served a true and accurate copy of the foregoing Order and Judgment

upon the following named persons by depositing said document in the United States mail, postage prepaid, addressed as follows:

Edwin F. Guyon
Attorney for Plaintiff
P.O. Box 17697
Salt Lake City, UT 84117

Tab E

EXHIBIT E

Glen M. Richman, Esq. (2752)
RICHMAN & RICHMAN
Attorney for Defendant
60 South 600 East, Suite 100
Salt Lake City, Utah 84102
Telephone: (801) 532-8844

IN THE THIRD DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TAMERA A. McDONALD, Plaintiff,	**DECREE OF DIVORCE (Integration of Prior Orders)**
vs.	
ROBERT M. McDONALD, Defendant.	**Civil No. 89-4901447 DA**
	Judge Frank G. Noel

The trial of this matter was held before the Honorable Frank G. Noel, District Judge, commencing on Monday, March 25, and concluding March 28, 1991. Prior to trial, the Court made various orders relating to the issues raised by the pleadings that are incorporated herein. Present at the trial and prior hearings were Plaintiff and her attorney, Edwin F. Guyon, and Defendant and his attorney, Glen M. Richman. The Court having considered the evidence presented by the parties, and being fully advised in the premises, and good cause appearing therefore, and having heretofore entered its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. On the basis of evidence presented to the Court on December 19, 1990, and the Findings and Conclusions of the Court with respect thereto, Plaintiff and Defendant were awarded a Decree of Divorce on the grounds of irreconcilable differences which was entered on the 7th day of January, 1991.

2. Defendant is awarded the care, custody and control of the minor child born of the marriage, Robert Andrew McDonald, born September 11, 1987, subject to reasonable and liberal rights of visitation on the part of Plaintiff as specifically described hereunder or as the parties may agree.

3. Plaintiff shall have the right to visit the child born of the marriage as follows: alternate weekends to commence on Friday at 9:00 p.m. and to end on Sunday at 8:00 p.m.; holiday visitation on alternate red-letter holidays, (New Years, President's Day, Easter, Mother's Day, Memorial Day, Independence Day, Labor Day, one day during the week of the child's birthday, Thanksgiving, Christmas); and six (6) weeks during the summer months of June, July and August, provided, however, that summer visitation shall be exercised in no less than two (2) segments not to exceed three (3) weeks each. The extended visitation during the summer months is under review by the Court as if on a motion to conform to standard summer visitation as applied in the Third District Court of four

(4) weeks, but in two (2) equal segments. The Court shall review the matter without prejudice to either party, and without the need to show a change of circumstances. The matter may be briefed by each party in accordance with Rule 4-501 of the Utah Rules of Judicial Administration. Defendant shall file a memorandum of points and authorities and Plaintiff may respond thereto. Either party shall file a notice to submit for ruling after Plaintiff's memorandum and the matter shall be determined without oral argument. Plaintiff is required to give notice of intent to exercise weekend visitation at least ten (10) days prior to the commencement of the weekend visitation period and shall give notice of intent and desired date to exercise summer visitation prior to May 1 of each calendar year. Unexercised visitation shall not accumulate. Other visitation shall be as the parties may agree. However, their agreement must be in writing.

4. Each of the parties is ordered to fully cooperate in visitation and custody matters and shall adhere strictly to the provisions of the Decree. Defendant shall have the child available and ready for visitation at the appointed times. Plaintiff shall promptly return the minor child to Defendant timely and without incident, at the conclusion of each visitation period. Failure to return the child to Defendant at the conclusion of the agreed visitation period may be punishable by contempt of court by ex-

parte order obtained upon Defendant's appropriate affidavit.

5. Defendant is ordered to pay to Plaintiff, for her continued maintenance and support, the sum of Three Hundred Fifty Dollars ($350.00) per month as alimony, payable 1/2 on the 5th and 1/2 of the 20th of applicable months, beginning in April, 1991. Said obligation shall absolutely cease and terminate at the end of March, 1996 or such earlier time of Plaintiff's death, remarriage, or cohabitation with a person of the opposite sex. Defendant may pay to Plaintiff a sum of money equal to the difference between the alimony award stated herein and Plaintiff's obligation to Defendant for child support during the time alimony is applicable. In the event Defendant elects to exercise this method of payment, the difference between alimony and child support shall be regarded as full payment of Defendant's alimony obligation.

6. Child support shall be as established by the Utah Uniform Child Support Guidelines as found in §78-45-7.2 - §78-45-7.14 Utah Code Annotated. Plaintiff shall pay to Defendant, for the use and benefit of the child born of the marriage, the sum of Three Hundred Two Dollars Fifty Cents ($302.50) per month as child support. Said payment obligation shall commence in April, 1991, and shall continue until such time as the child attains the age of eighteen (18) years or graduates from high school with his expected graduating class, whichever last occurs. In the event Defendant

exercises the method of payment of alimony stated in the preceding paragraph, Plaintiff's child support obligation shall be discharged by an off-set against Defendant's alimony obligation to Plaintiff during the applicable period. Fifty percent (50%) of the child support shall abate for periods of visitation with Plaintiff for twenty five (25) or more consecutive days of any thirty (30) day period in accordance with §75-45-7.11 Utah Code Annotated.

7. In accordance with §78-45-7, Utah Code Annotated, Defendant is ordered to maintain hospital and medical insurance in effect for the minor child during his minority to age 18 years so long as it is reasonably available to him at a reasonable cost through his employment. Plaintiff is also ordered to maintain hospital and medical insurance for the benefit of the minor child during minority to age 18, provided it is reasonably available to her through her employment at a reasonable cost. Each of the parties shall be responsible to pay one-half of any hospital, medical and dental expenses incurred for the minor child, including orthodontics, not otherwise covered by insurance.

8. Defendant is awarded all right, title and interest in and to the real property situated 1167 Brickyard Road, #802, Salt Lake City, Utah, more particularly described as:

> Unit No. 802 in Building 8 of Brickyard Condominiums, Phase I, together with the undivided ownership interest in the common areas and facilities which is actually appurtenant to said unit, and subject to the project's

declaration, which provides for alteration both in the magnitude of said undivided ownership interest in the composition of the common areas and facilities to which said interest relates, all of which is set forth, established and identified on the record of survey map of the Brickyard, Phase I, filed for record in the office of the County Recorder of Salt Lake County, Utah, on the 18th day of August, 1978, in Book 78-8, Page 231 of Plats, as Entry No. 3155499 and as set forth in the declaration for the said Brickyard Condominiums, Phase I, dated the 5th day of June, 1978 and recorded as Entry No. 3155498 in Book 4725 at Page 830 of official records, subject to and together with all easements and rights of way as shown and described in said Record of Survey Map and as set forth in said declaration of said Brickyard Condominium, Phase I, including, but not limited to Brickyard Declaration dated the 18th day of August, 1978 and recorded on the 18th day of August, 1978 as Entry No. 3155497 in Book 4725 at Page 814 of official records, and all amendments thereto

free and clear of all claims of Plaintiff. Plaintiff shall execute and deliver to Defendant any and all deeds or other documents necessary to clear record title to said property in Defendant's sole name.

9. Defendant is awarded all right, title and interest in and to the personal property described on Exhibits "A", "D" and "E" attached hereto and incorporated herein by reference. Plaintiff shall execute and deliver to Defendant any and all certificates of title or other documents necessary to establish record title in said property in Defendant's sole name.

10. Plaintiff is awarded all right, title and interest in and to the personal property described on Exhibits "B" and "F" attached hereto and incorporated herein by reference. Defendant shall

execute and deliver to Plaintiff any and all certificates of title or other documents necessary to establish record title to said property in Plaintiff's sole name.

11. In order to equalize the division of personal property values, Defendant shall pay to Plaintiff the sum of Two Thousand Forty Two Dollars Fifty Cents ($2,042.50) within thirty (30) days after the entry of this Decree.

12. Defendant shall pay and discharge all obligations to the following creditors:

CREDITOR	APPROXIMATE BALANCE	MONTHLY PAYMENT
Valley Mortgage Co.	$55,000.00	$635.59
Ford Motor Credit	20,000.00	657.00
Mt. America C.U.(Lincoln)	7,000.00	469.70
Internal Revenue Service	30,000.00	500.00
Utah State Tax Comm.	8,000.00	300.00
Pension Plan	20,000.00	
Centurion Bank	9,000.00	385.00
Brickyard Homeowners Assoc.		99.00

Defendant shall indemnify Plaintiff and save her harmless from liability with respect to the claims of said creditors arising out of the indebtedness above described in this paragraph.

13. Plaintiff shall pay and discharge all obligations to the following creditor: Mountain America Credit Union in the approximate amount of $17.443.00 secured by the 1988 Ford van. Plaintiff shall indemnify Defendant and save him harmless from liability from the claims of the creditor described in this

paragraph.

14. Plaintiff is awarded judgment against Defendant in the sum of Seven Thousand Five Hundred Dollars ($7,500.00) as attorney's fees.

15. The parties are enjoined from making any derogatory statements concerning the other party in the presence of the minor child.

16. In the event Plaintiff enters Defendant's home over the objection of Defendant, an ex parte injunction shall be entered by the Court enjoining such entry upon filing by Defendant of an appropriate affidavit noting such unauthorized entry.

17. The parties are each required to execute any and all documents necessary to implement the provisions of this Decree.

DATED this 30th day of October, 1991.

BY THE COURT:

HONORABLE FRANK G. NOEL
DISTRICT COURT JUDGE

APPROVED AS TO FORM AND CONTENT:

JAMES I. WATTS
Attorney for Plaintiff

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT FILED IN THE DISTRICT COURT
STATE OF UTAH
DATE Oct 30 1991
Roy Robinson

Tab F

EXHIBIT F

Glen M. Richman, Esq. (2752)
RICHMAN & RICHMAN
Attorney for Defendant
60 South 600 East, Suite 100
Salt Lake City, Utah 84102
Telephone: (801) 532-8844

IN THE THIRD DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TAMERA A. McDONALD, Plaintiff, vs. ROBERT M. McDONALD, Defendant.	AMENDED DECREE OF DIVORCE (Integration of Prior Orders) Civil No. 89-4901447 DA Judge Frank G. Noel

The trial of this matter was held before the Honorable Frank G. Noel, District Judge, commencing on Monday, March 25, and concluding March 28, 1991. Prior to trial, the Court made various orders relating to the issues raised by the pleadings that are incorporated herein. Present at the trial and prior hearings were Plaintiff and her attorney, Edwin F. Guyon, and Defendant and his attorney, Glen M. Richman. The Court having considered the evidence presented by the parties, and being fully advised in the premises, and good cause appearing therefore, and having heretofore entered its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. On the basis of evidence presented to the Court on December 19, 1990, and the Findings and Conclusions of the Court with respect thereto, Plaintiff and Defendant were awarded a Decree of Divorce on the grounds of irreconcilable differences which was entered on the 7th day of January, 1991.

2. Defendant is awarded the care, custody and control of the minor child born of the marriage, Robert Andrew McDonald, born September 11, 1987, subject to reasonable and liberal rights of visitation on the part of Plaintiff as specifically described hereunder or as the parties mav agree. In the event the parties agree to visitation in excess of the visitation specified in the following paragraph, the parties shall acknowledge the terms and provisions of such agreement for additional visitation in writing prior to exercise of the visitation including, but not limited to, the date, time and place when the child shall be returned. Plaintiff is hereby ordered to strictly abide by the conditions stated in the writing and failure to do so shall be a violation of the provisions of this Decree and the Court may impose sanctions or punishment as it deems appropriate.

3. Plaintiff shall have the right to visit the child born of the marriage as follows: alternate weekends to commence on Friday at 9:00 p.m. and to end on Sunday following at 8:00 p.m.; holiday

visitation on alternate red-letter holidays specified herein: in odd numbered calendar years New Year's vistation from December 29 of the preceding year to January 2 of the odd numbered year, Martin Luther King Day, President's Day, Memorial Day, Labor Day and Christmas vacation from December 23 to December 28; in even numbered calendar years, Easter, Independence Day, and Thanksgiving Day; Mother's Day of every calendar year and Plaintiff's birthday in every calendar year. Plaintiff shall have the right to visit the child on the child's birthday in even nunmbered calendar years and, in odd numbered calendar years, the right to visit the child on a date in close proximity (within 10 days) of the child's birthday. Defendant shall have the right in all calendar years to spend the following days with the child: Father's Day, Defendant's birthday and all holidays not designated for visitation with Plaintiff. Plaintiff shall also have summer visitation for six weeks during the months of June, July and August, provided, however, the visit shall be exercised in no less than two (2) segments not to exceed three (3) weeks. The extended visitation during the summer months is under review by the Court. The Court shall review the matter without prejudice to either party, and without the need to show a change of circumstances. The matter may be briefed by each party in accordance with Rule 4-501 of the Utah Rules of Judicial Administration. Defendant shall file a

memorandum of points and authorities and Plaintiff may respond thereto. Either party shall file a notice to submit for ruling after Plaintiff's memorandum and the matter shall be determined without oral argument. Holidays take precedence over the weekend visitation schedule. No changes shall be made to the established rotation of alternate weekends. It is understood this may result in Plaintiff losing a regular visitaiton (a weekend falling on a holiday reserved to Defendant) or may result in Plaintiff having consecutive weekends (when the first of said weekends is a regular weekend visitation). Plaintiff is required to give notice of intent to exercise weekend visitation at least ten (10) days prior to the commencement of the weekend visitation period and shall give notice of intent and desired date to exercise summer visitation prior to May 1 of each calendar year. Unexercised visitation shall not accumulate. Other visitation shall be as the parties may agree in writing.

4. Each of the parties is ordered to fully cooperate in visitation and custody matters and shall adhere strictly to the provisions of the Decree. Defendant shall have the child available and ready for visitation at the appointed times. Plaintiff shall promptly return the minor child to Defendant timely and without incident, at the conclusion of each visitation period. Failure to return the child to Defendant at the conclusion of the agreed

visitation period may be punishable by contempt of court by ex-parte order obtained upon Defendant's appropriate affidavit.

5. Defendant is ordered to pay to Plaintiff, for her continued maintenance and support, the sum of Three Hundred Fifty Dollars ($350.00) per month as alimony, payable 1/2 on the 5th and 1/2 of the 20th of applicable months, beginning in April, 1991. Said obligation shall absolutely cease and terminate at the end of March, 1996 or such earlier time of Plaintiff's death, remarriage, or cohabitation with a person of the opposite sex. Defendant may pay to Plaintiff a sum of money equal to the difference between the alimony award stated herein and Plaintiff's obligation to Defendant for child support during the time alimony is applicable. In the event Defendant elects to exercise this method of payment, the difference between alimony and child support shall be regarded as full payment of Defendant's alimony obligation.

6. Child support shall be as established by the Utah Uniform Child Support Guidelines as found in §78-45-7.2 - §78-45-7.14 Utah Code Annotated. Plaintiff shall pay to Defendant, for the use and benefit of the child born of the marriage, the sum of Three Hundred Two Dollars Fifty Cents ($302.50) per month as child support. Said payment obligation shall commence in April, 1991, and shall continue until such time as the child attains the age of eighteen (18) years or graduates from high school with his expected

graduating class, whichever last occurs. In the event Defendant exercises the method of payment of alimony stated in the preceding paragraph, Plaintiff's child support obligation shall be discharged by an off-set against Defendant's alimony obligation to Plaintiff during the applicable period. Fifty percent (50%) of the child support shall abate for periods of visitation with Plaintiff for twenty five (25) or more consecutive days of any thirty (30) day period in accordance with §75-45-7.11 Utah Code Annotated.

7. In accordance with §78-45-7, Utah Code Annotated, Defendant is ordered to maintain hospital and medical insurance in effect for the minor child during his minority to age 18 years so long as it is reasonably available to him at a reasonable cost through his employment. Plaintiff is also ordered to maintain hospital and medical insurance for the benefit of the minor child during minority to age 18, provided it is reasonably available to her through her employment at a reasonable cost. Each of the parties shall be responsible to pay one-half of any hospital, medical and dental expenses incurred for the minor child, including orthodontics, not otherwise covered by insurance.

8. Defendant is awarded all right, title and interest in and to the real property situated 1167 Brickyard Road, #802, Salt Lake City, Utah, more particularly described as:

> Unit No. 802 in Building 8 of Brickyard Condominiums, Phase I, together with the undivided ownership interest

> in the common areas and facilities which is actually appurtenant to said unit, and subject to the project's declaration, which provides for alteration both in the magnitude of said undivided ownership interest in the composition of the common areas and facilities to which said interest relates, all of which is set forth, established and identified on the record of survey map of the Brickyard, Phase I, filed for record in the office of the County Recorder of Salt Lake County, Utah, on the 18th day of August, 1978, in Book 78-8, Page 231 of Plats, as Entry No. 3155499 and as set forth in the declaration for the said Brickyard Condominiums, Phase I, dated the 5th day of June, 1978 and recorded as Entry No. 3155498 in Book 4725 at Page 830 of official records, subject to and together with all easements and rights of way as shown and described in said Record of Survey Map and as set forth in said declaration of said Brickyard Condominium, Phase I, including, but not limited to Brickyard Declaration dated the 18th day of August, 1978 and recorded on the 18th day of August, 1978 as Entry No. 3155497 in Book 4725 at Page 814 of official records, and all amendments thereto

free and clear of all claims of Plaintiff. Plaintiff shall execute and deliver to Defendant any and all deeds or other documents necessary to clear record title to said property in Defendant's sole name.

9. Defendant is awarded all right, title and interest in and to the personal property described on Exhibits "A", "D" and "E" attached hereto and incorporated herein by reference. Plaintiff shall execute and deliver to Defendant any and all certificates of title or other documents necessary to establish record title in said property in Defendant's sole name.

10. Plaintiff is awarded all right, title and interest in and to the personal property described on Exhibits "B" and "F" attached

hereto and incorporated herein by reference. Defendant shall execute and deliver to Plaintiff any and all certificates of title or other documents necessary to establish record title to said property in Plaintiff's sole name.

11. In order to equalize the division of personal property values, Defendant shall pay to Plaintiff the sum of Two Thousand Forty Two Dollars Fifty Cents ($2,042.50) within thirty (30) days after the entry of this Decree.

12. Defendant shall pay and discharge all obligations to the following creditors:

CREDITOR	APPROXIMATE BALANCE	MONTHLY PAYMENT
Valley Mortgage Co.	$55,000.00	$635.59
Ford Motor Credit	20,000.00	657.00
Mt. America C.U.(Lincoln)	7,000.00	469.70
Internal Revenue Service	30,000.00	500.00
Utah State Tax Comm.	8,000.00	300.00
Pension Plan	20,000.00	
Centurion Bank	9,000.00	385.00
Brickyard Homeowners Assoc.		99.00

Defendant shall indemnify Plaintiff and save her harmless from liability with respect to the claims of said creditors arising out of the indebtedness above described in this paragraph.

13. Plaintiff shall pay and discharge all obligations to the following creditor: Mountain America Credit Union in the approximate amount of $17,443.00 secured by the 1988 Ford van. Plaintiff shall indemnify Defendant and save him harmless from

liability from the claims of the creditor described in this paragraph.

14. Plaintiff is awarded judgment against Defendant in the sum of Seven Thousand Five Hundred Dollars ($7,500.00) as attorney's fees.

15. The parties are enjoined from making any derogatory statements concerning the other party in the presence of the minor child.

16. In the event Plaintiff enters Defendant's home over the objection of Defendant, an ex parte injunction shall be entered by the Court enjoining such entry upon filing by Defendant of an appropriate affidavit noting such unauthorized entry.

17. The parties are each required to execute any and all documents necessary to implement the provisions of this Decree.

DATED this 12 day of December, 1991.

BY THE COURT:

HONORABLE FRANK G. NOEL
DISTRICT COURT JUDGE

APPROVED AS TO FORM AND CONTENT:

JAMES I. WATTS
Attorney for Plaintiff

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.
DATE: Dec. 12, 1991

DEPUTY COURT CLERK

Tab G

EXHIBIT G

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FILED
DISTRICT COURT

DEC 23 9 46 AM '91

BY ____ DEPUTY CLERK

Glen M. Richman (2752)
Attorney for Defendant
60 South 600 East, Suite 100
Salt Lake City, UT 84102
Telephone: (801) 532-8844

+ Bond

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TAMERA A. McDONALD,	:	TEMPORARY RESTRAINING ORDER
Plaintiff,	:	
vs.	:	Civil No. 89-4901447
ROBERT M. McDONALD,	:	Judge Frank G. Noel
Defendant.	:	

Based upon the affidavits of Defendant dated November 25, 1991, and December 16, 1991, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiff, Edwin Guyon and any person acting or purporting to act on behalf of Plaintiff or Edwin Guyon, including Constable John Sindt, are hereby restrained from conducting a sale of Defendant's property on December 19, 1991, or at any other time, or in any other manner selling, transferring or assigning or purporting to sell, transfer or assign any of Defendant's property.

This Order is based upon the following findings by the Court:

1. The sale of Defendant's property purports to be based upon a judgment entered in favor of Plaintiff and against Defendant in the sum of $7,500.00, and Defendant appears to have valid set-

DATE 12-18-91 TIME 1508
B/R 4335 400 E
UPON Edwin Guyon City for Plaintiff
SINDT CONSTABLE S.L. COUNTY, UTAH
DEPUTY

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offs against said judgment in the sum of $4,096.00 by reason of judgments heretofore entered in favor of Defendant and against Plaintiff.

2. It appears that Plaintiff has failed and refused to comply with the prior order of the Court that she pay and discharge all indebtedness to Mountain America Credit Union secured by the 1988 Ford van and that such failure gives rise to a claim on the part of Defendant against Plaintiff is a sum in excess of $3,404.00, which would totally set-off and discharge the judgment upon the proposed sale is based.

3. Defendant has filed a motion for judgment against Plaintiff arising out of Plaintiff's failure to pay indebtedness to Mountain America Credit Union and it appears probable that said motion would be granted. If such motion were granted, the judgment of $7,500.00, upon which the proposed sale is based, would be fully paid and discharged.

4. Defendant may be irreparably harmed if the sale scheduled for December 19, 1991, is not restrained.

This Temporary Restraining Order is entered after the Court has made telephone contact with Edwin Guyon and given Edwin Guyon full opportunity to address the merits of Defendant's motion for temporary restraining order.

This Temporary Restraining Order is granted this 17 day of December, 1991, at the hour of 11:25 a.m. and shall expire by its terms on December 27, 1991, at the hour of

11:25 a.m. unless extended by the Court for good cause shown. Granted upon filing 500.00 bond.

BY THE COURT:

HONORABLE FRANK G. NOEL
THIRD DISTRICT COURT JUDGE

Tab H

EXHIBIT H

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TAMERA A. McDONALD,	:	MINUTE ENTRY
Plaintiff,	:	Civil No. 894901447 DA
vs.	:	JUDGE FRANK G. NOEL
ROBERT M. McDONALD,	:	
Defendant.	:	

Now before the Court is defendant's Motion to Quash Praecipe and Execution and Alternative Motion to Stay Enforcment of Praecipe and Execution. The Court has reviewed the memos and affidavits filed in connection with said Motion and now rules as follows:

The precise wording of the Decree of Divorce pertaining to attorneys fees is as follows:

> "Plaintiff is awarded judgment against defendant in the sum of $7,500.00 (Seven thousand five hundred dollars) as attorneys fees."

The Court is of the opinion that this is a judgment granted in favor of the plaintiff. Plaintiff's Counsel must look to plaintiff for the actual payment of his attorneys fees. The record does not reflect the current balance claimed by either plaintiff or plaintiff's Counsel, to be owed for attorneys

fees. In any event the Court is of the opinion that plaintiff's Counsel must look to plaintiff for payment of his fees and accordingly grants the Motion to Quash the Praecipe and Execution.

Counsel for defendant is to prepare an order consistent with this ruling.

DATED this 16 day of January, 1992.

FRANK G. NOEL
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 16 day of January, 1992:

Edwin F. Guyon
Attorney for Plaintiff
433 South 400 East
Salt Lake City, Utah 84111

Glen M. Richman
Attorney for Defendant
60 South 600 East, Suite 100
Salt Lake City, Utah 84102

Jeanie Olson

Tab I

EXHIBIT I

Glen M. Richman, Esq. (2752)
RICHMAN & RICHMAN
Attorney for Defendant
60 South 600 East, Suite 100
Salt Lake City, Utah 84102
Telephone: (801) 532-8844

IN THE THIRD DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TAMERA A. McDONALD,	
Plaintiff,	**ORDER**
vs.	**Civil No. 89-4901447 DA**
ROBERT M. McDONALD,	**Judge Frank G. Noel**
Defendant.	

Defendant's Motion to Quash Praecipe and Execution and Alternative Motion to Stay Enforcement of Praecipe and Execution came before the Court on Defendant's motion in writing, supported by affidavit and memorandum. The Court also received responsive memorandum of Plaintiff. The matter was submitted for decision by Plaintiff through her counsel dated the 27th day of November, 1991, and the Court having reviewed the matter and being fully advised in the premises, grants Defendant's Motion.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant's Motion to Quash Praecipe and Execution and to Stay Enforcement of Praecipe and Execution obtained by Plaintiff's

former counsel, Mr. Edwin Guyon, is hereby granted. Said Praecipe and Execution are quashed and are of no effect and enforcement of the same is stayed.

2. Plaintiff's former attorney, Edwin Guyon, must look directly to his client, Tamera A. McDonald, Plaintiff, for payment of his attorney's fees.

DATED this 7 day of ~~January~~ Feb., 1992.

BY THE COURT:

FRANK G. NOEL
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

STATE OF UTAH)
)ss.
COUNTY OF SALT LAKE)

Leora Loy, being first duly sworn, deposes and says as follows:

She is a secretary in the law firm of RICHMAN & RICHMAN, attorneys for Defendant herein.

That she served the attached Order upon Plaintiff by placing a copy in an envelope addressed to:

Edwin F. Guyon, Esq.
433 South 400 East
Salt Lake City, Utah 84111

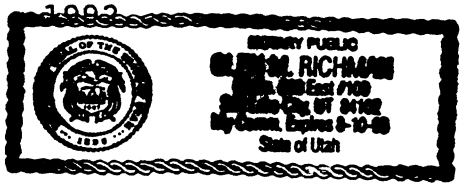
and

James I Watts, Esq.
124 South 600 East, Suite 100
Salt Lake City, Utah 84102

and depositing the same, sealed with first class postage prepaid thereon in the United States mail at Salt Lake City, Utah on the 22nd day of January, 1992.

Leora Loy
Leora Loy

SUBSCRIBED AND SWORN to before me this 22nd day of January, 1992.



Glenn M. Richman
NOTARY PUBLIC
Residing at Salt Lake County, Utah

My Commission Expires:
8-10-93

Tab J

EXHIBIT J

Edwin F. Guyon
205 Newhouse Building
Salt Lake City, Utah 84111
801/355-8811

THIRD DISTRICT COURT, SALT LAKE COUNTY, UTAH

TAMERA A. McDONALD

plaintiff

vs.

ROBERT M. McDONALD

defendant

* * * * * * *

EDWIN F. GUYON

vs.

ROBERT M. McDONALD

AMENDMENT TO JUDGMENT

2169489

case no. 8904901447 - DA
Judge Frank G. Noel

On the 25th to 28th of March, 1991 came on to be heard the instant action; thereafter, on December 12, 1991 the court entered its amended decree of divorce; and the court upon motion and hearing and for the reasons stated in its memorandum decision entered the 7th day of May, 1992 it is hereby ordered that said December 12, 1991 decree be and hereby is amended to provide, in lieu of payment of attorney fees directly to plaintiff, as follows:

Defendant shall pay directly to Edwin F. Guyon as counsel for plaintiff, as attorney fees, the sum of $7,500.00.

Dated the 15 day of July, 1992.

BY THE COURT:

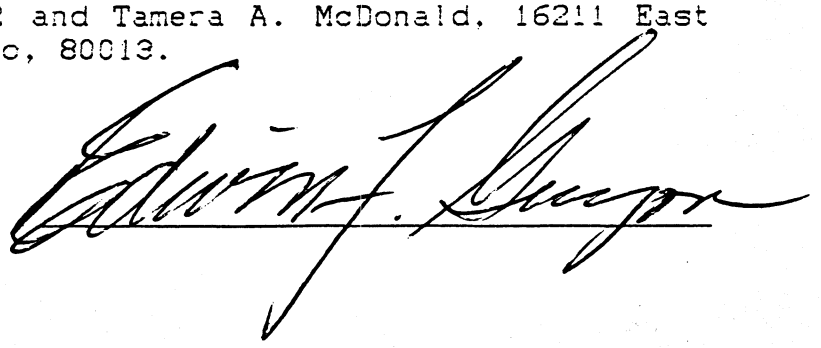
Judge Frank G. Noel

STATE OF UTAH
DISTRICT COURT

On the 2nd day of July, 1992 copies of the foregoing were

00120?

mailed to Glen M. Richman, Esq., 60 South 600 East, #100, Salt Lake City, Utah, 84102; James I. Watts, Esq. 124 South 600 East, #100, Salt Lake City, Utah, 84102 and Tamera A. McDonald, 16211 East Flora Place, Aurora, Colorado, 80013.



Tab K

EXHIBIT K

Edwin F. Guyon - 1284
counsel for plaintiff
433 South 400 East
Salt Lake City, Utah 84111
801/355-8811

THIRD DISTRICT COURT, SALT LAKE COUNTY, UTAH

TAMERA A. McDONALD

plaintiff

OBJECTIONS TO PROPOSED FINDINGS and JUDGMENT

vs.

ROBERT M. McDONALD

defendant

case no. 894901477 - DA
Judge Frank G. Noel

STATEMENT OF FACTS

1. On March 28, 1991 subsequent to hearing in the instant action regarding property distribution, custody, support and visitation matters the court orally stated its rulings and opinion. A copy of the transcript of said findings and opinion is attached hereto and made a part hereof for all purposes labeled exhibit A.

2. Defendant subsequently filed with the court documents labeled "findings of fact and conclusions of law (integration of prior findings and conclusions)" and "decree of divorce (integration of prior orders)". Copies of said documents have been filed with the court and are made a part hereof for all purposes as fully and completely as if attached hereto and made a part hereof.

3. Plaintiff advised the court that said documents did not conform to the rulings of the court, objected to them generally and thereafter filed with the court documents labeled "findings of

fact and conclusions of law" and "judgment" which in the opinion of plaintiff more closely comply with the rulings of the court. Copies of said documents have been filed with the court and are made a part hereof for all purposes as fully and completely as if attached hereto and made a part hereof.

4. On August 12, 1991 and subsequent to notice the court heard argument of counsel as to the position of the parties thereto (including related motions) and directed that plaintiff file written objections to defendant's proposed findings and decree.

OBJECTIONS TO FINDINGS

Plaintiff objects to defendant's proposed "findings of fact" as follows: (references are to page, paragraph and line)

1. 2;4;1 - The statement regarding the appointment of Dr. Reisinger is not an ultimate fact.

2. 2;5;1 - The statements regarding insurance are not relevant to the judgment.

3. 2;6;1 - The statement regarding alimony/attorney fees is not relevant and is redundant.

4. 2;7;1 - The statements regarding divorce are redundant, a divorce having been granted prior to the instant action, are not ultimate facts, are subordinate material facts.

5. Defendant wholly failed to include as a finding of fact that: ". . . defendant has that (substance abuse) somewhat under control; and in the future if it should appear that he no longer has that under control, that may very well indeed be a change of circumstances that the court would have to consider with

regard to custody of this boy, because I believe that's [a] very important factor that has to be considered by the Court." (transcript, page 7, lines 10 to 16)

OBJECTIONS TO MIXED FINDINGS/CONCLUSIONS

Plaintiff objects to defendant's proposed "mixed findings of fact and conclusions of law" as follows: (references are to page, paragraph and line)

1. 5;14;1 to end - Plaintiff is not aware of the existence of any statutory authority "mixing" findings of fact and conclusions of law. Plaintiff is not aware of any binding judicial decision permitting the "mixing" of findings of fact and conclusions of law. Defendant's statements are generally not ultimate facts, not subordinate material facts, nor relevant to any issue before the court and are, at best, conclusory. The very purpose of separating findings of fact from conclusions of law is to permit review of facts and law separately. Further, defendant's statements do not conform with the actual findings of the Court.

OBJECTIONS TO CONCLUSIONS

Plaintiff objects of defendant's proposed "conclusions of law" as follows: (references are to page, paragraph and line)

9;2;4 - The date the decree of divorce in the instant action was entered is January 7, 1991.

9;3;1 - This paragraph recites a finding of fact and, in the event it supports a judgment, should be included in the findings of fact.

12;8;9 to 11 - The conclusion granting to defendant the election as to how payment of funds between parties is to occur is

does not conform to the oral findings.

14;19;1ff - Statements regarding payment of attorney fees are wholly without regard to representations by plaintiff's counsel (see transcript, page 14, lines 23 to 25 and page 15, lines 1 to 20). The purpose of plaintiff's agreement regarding fees was made as a courtesy, convenience and benefit to defendant, not to change the terms and conditions of the judgment nor to permit defendant to unilaterally determine what he wanted as payment schedules.

OBJECTIONS TO DECREE

Plaintiff objects to defendant's proposed "decree of divorce" as follows: (references are to page, paragraph and line)

1. 2;1;1 - The date of entry of the decree of divorce in the instant action is January 7, 1991 not December 29, 1990.

2. 2;2;1 - Plaintiff is entitled to reasonable visitation not as "specifically described hereunder" but at least a minimum of the described visitation.

3. 2;3;2 to 5 - Plaintiff is entitled to visitation on all odd numbered weekends, no limitation should exist as to the 5th weekend of each month.

4. 3;5;7 to 10 - The court's oral findings do not grant to defendant the option regarding the circumstances by which payments are made.

5. 4;6;9 to 12 - The court's oral findings do not grant to defendant the option regarding the circumstances by which payments are made.

6. 7;14;1ff - Attorney fees are a matter of judgment,

not agreement, defendant's obligation is a matter of judgment, not agreement and, in the event no agreement is reached, plaintiff is entitled to enforce judgment.

MEMORANDUM OF LAW

1. Rule 52(a), Utah Rules of Civil Procedure provides in relevant part that:

> In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately it conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; . . .

2. Rule 52(a), Utah Rules of Civil Procedure further provides that:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

3. Rule 52(a), Utah Rules of Civil Procedure specifically provides that:

> It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.

4. Rule 52(b), Utah Rules of Civil Procedure provides in relevant part that:

> When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

5. Rule 52(c), Utah Rules of Civil Procedure provides in relevant part that:

> Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an

issue of fact: . . .

6. Rule 52 does not mandate the entry of signed, written findings and conclusions but specifically permits the trial court the opportunity to state its findings orally if it chooses, Martindale v. Adams, 777 P.2d 514 (Utah App 1989).

7. Findings by the court should be limited to the ultimate facts and if they ascertain ultimate facts, and sufficiently conform to the pleadings and the evidence to support the judgment, are sufficient, Pearson v. Pearson, 561 P.2d 1080 (Utah 1977).

8. In entering an order awarding or modifying child custody the trial court must enter specific findings on the factors relied upon in awarding/modifying such custody. Hutchison v. Hutchison, 649 P.2d 38 (Utah 1983); Smith v. Smith, 726 P.2d 312 (Utah 1986).

9. In actions involving custody, oral findings made by the trial judge at the close of the evidence are sufficient to support a custody award if they demonstrate that the determination was based on factors relevant to the best interests of the child, Hansen v. Hansen, 736 P.2d 1055 (Utah App) cert denied 765 P.2d 1277 (Utah 1987).

10. Rulings in custody actions must be firmly anchored in findings of fact, whether written or oral, that are sufficiently detailed, include sufficient facts to disclose the process through which the ultimate conclusion is reached, indicate the process is logical and properly supported, and are not clearly erroneous, Marchant v. Marchant, 743 P.2d 199 (Utah App 1987).

11. Credibility of a witness is not a factual issue that is appropriately the subject of the trial court's findings as the ultimate findings themselves reflect the consideration of a witnesses' credibility, McKinstray v. McKinstray, 628 P.2d 1286 (Utah 1981).

12. The trial court should make findings on all material subordinate and ultimate factual issues with the limitation that it is not necessary to resolve other lesser or non-relevant evidentiary issues, Sorenson v. Beers, 614 P.2d 762 (Utah 1980).

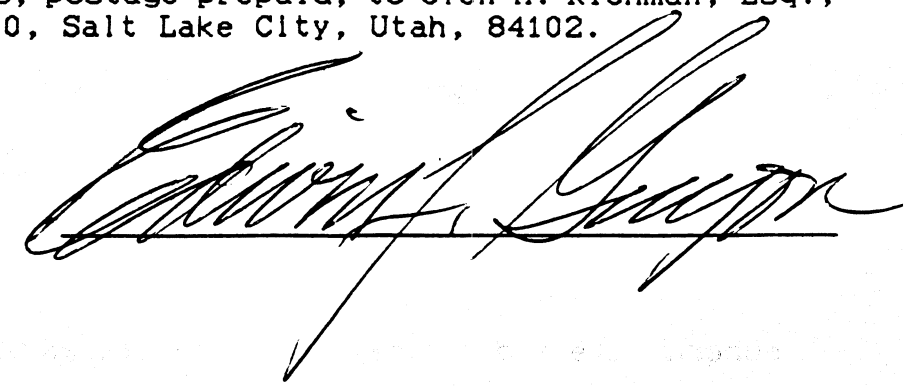
13. While failure to find upon all material issues raised in the pleadings is reversible error, LeGrand Johnson Crop. v. Peterson, 420 P.2d 615 (Utah 1966) the court has a duty to find facts upon all material issues submitted for decision unless such findings are waived, Boyer v. Lignell, 567 P.2d 1112 (Utah 1977) or where the evidence is clear, uncontroverted, and only capable of supporting a finding in favor of the judgment, Kinkella v. Baugh, 660 P.2d 233 (Utah 1983).

Wherefore plaintiff requests that the court adopt the findings, conclusions and judgment submitted by plaintiff as the findings, conclusions and judgment of the court in the instant matter.

Dated the 16TH day of AUGUST, 1991.

By: _____
Edwin F. Guyon, counsel for plaintiff

I certify that on the above date a copy of the foregoing was mailed, first class, postage prepaid, to Glen M. Richman, Esq., 60 South 600 East, #100, Salt Lake City, Utah, 84102.



Tab L

EXHIBIT L

all support the finding that these were separate entities. So does the conduct of the parties, including the monthly lease payments from Fairfield Services to Fairfield Enterprises, and the filing of separate tax returns for each organization. In the lease agreement, the manager expressly agreed to "pay all bills related to the operation of the business." We therefore reject the manager's attack upon this key finding, and sustain the district court's conclusion that the manager was responsible for the unpaid debts of the service station.

2. The manager also argues that the financing partner had a duty to disclose the value of the manager's limited partnership interest before acquiring it from him in the settlement. This failure to disclose is characterized as "constructive fraud."

[2, 3] Partners obviously occupy a fiduciary relationship and must deal with each other in the utmost good faith. U.C.A., 1953, § 48–1–18; *Nelson v. Matsch*, 38 Utah 122, 128, 110 P. 865, 868 (1910). This duty applies when one partner (especially a managing partner) seeks to purchase the interest of another partner. *W.A. McMichael Construction Co. v. D & W Properties, Inc.*, La.App., 356 So.2d 1115, 1120–22 (1978); *Annot.*, 4 A.L.R.4th 1122, 1129–45 (1981). In such a case, a breach of duty occurs if the acquiring partner falsely represents or conceals matters with respect to the value of the interest of the selling partner. *Nelson v. Matsch, supra*, 38 Utah at 128–29, 110 P. at 868; *W.A. McMichael Construction Co. v. D & W Properties, Inc., supra*, at 1122; U.C.A., 1953, § 48–1–17.

[4] In this case, however, no false representation or concealment has been alleged. Rather, the manager's only claim is that the financing partner did not voluntarily disclose to him the value of his partnership interest. Such a failure is not a breach of fiduciary duty where the manager has ample access to information about the value of his partnership interest. Here the party who was relinquishing the limited partnership interest managed and kept the financial records of the primary partnership asset, the service station. He also admitted to having ready access to the records of the partnership, Fairfield Enterprises, as was his right under the limited partnership agreement and by law. U.C.A., 1953, § 48–1–16. Whatever duty of affirmative disclosure might exist in a circumstance where the partners have decidedly unequal access to information about the nature or value of the partnership assets, that duty does not exist or was not violated on the facts of this case.[1] *Cf. Craft v. Bates*, Okla., 372 P.2d 10, 13 (1962); *Geddes's Appeal*, 80 Pa. 442, 462 (1876).

The manager makes several other arguments in his brief. However, inasmuch as each of these is based on the allegation of constructive fraud, none need be considered here.

The judgment is affirmed. No costs awarded.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.

Ruth Jeppson Peterson PENROSE, Plaintiff and Respondent,

v.

Wallace Herbert PENROSE, Defendant and Appellant.

No. 17576.

Supreme Court of Utah.

Dec. 16, 1982.

Husband appealed from judgment of the Third Judicial District Court, in and for Salt Lake County, Christine M. Durham, J.,

1. This is not a case where a managing general partner acquires the interest of a limited partner who has no independent access to information about the nature and value of the business.

resulting in judgment in wife's favor in sum of $30,000 as lump-sum alimony and monthly alimony of $200 per month; provided that upon payment of $30,000 lump sum, monthly obligation would cease. The Supreme Court, Dee, District Judge, held that: (1) record supported trial court conclusion that wife was in need of and entitled to $200 per month, and (2) $30,000 lump-sum award would have to be conditioned so as to allow corpus to revert back to husband or his estate upon termination of husband's obligation to support wife.

Remanded with directions.

1. Divorce ⇐239

Record in divorce action supported trial court's conclusion that wife was in need of and entitled to $200 per month alimony.

2. Appeal and Error ⇐847(1), 1153

It is duty and prerogative of Supreme Court in equity matters, where occasion warrants, and after review of both facts and law, to fashion its own remedy as substitute for judgment of trial court, but that court's action should only be disturbed to prevent manifest injustice.

3. Divorce ⇐241

Where $30,000 lump-sum alimony award violated antenuptial agreement which only required husband to provide for support needs of wife, and those needs were $200 per month, $30,000 lump-sum award would have to be conditioned so as to allow corpus to revert back to husband or his estate upon termination of husband's obligation to support wife.

Macoy A. McMurray, Salt Lake City, for defendant and appellant.

Fred L. Finlinson, Salt Lake City, for plaintiff and respondent.

DEE, District Judge:

This is an appeal from a judgment entered by the Third Judicial District Court, in and for Salt Lake County, awarding a lump sum and monthly alimony in a Decree of Divorce to Mrs. Penrose, the plaintiff and respondent. The defendant and appellant appeals from the lower court decision which resulted in a judgment in plaintiff's favor for the sum of thirty thousand dollars ($30,000.00) as "lump sum alimony," and monthly alimony of two hundred dollars ($200.00) per month; provided however, that upon payment of the $30,000.00 lump sum, the monthly obligation would cease.

The relevant facts on appeal are as follows:

Mr. and Mrs. Penrose, hereinafter the defendant and plaintiff respectively, were married on August 13, 1959, a late-in-life second marriage for both. The defendant was sixty (60) years of age, the plaintiff fifty-four (54) years of age, at the time of the marriage. Each party owned substantial assets which each had accrued separately prior to the marriage. Pursuant to the circumstances, the parties entered into an antenuptial agreement which, among other things, provided:

> It is mutually desired and agreed by the parties that the estate of each of the parties shall remain separate, and be subject to the sole control and use of its owner, as well after marriage as previous thereto . . .
>
> * * * * * *
>
> It is further agreed by the party of the first part (defendant herein) that he does and will from his own personal estate assume the necessary expenses of the support and maintenance of the party of the second part (plaintiff herein).

The parties generally conducted their business affairs in accordance with the provisions of the agreement throughout their twenty (20) years of marriage. In the middle part of 1977 the marriage began to deteriorate, followed by a divorce action in the latter part of 1977. The lower court, after trial, determined that the plaintiff should be awarded a divorce, and proceeded to make the above referred to judgment.

The defendant and appellant argues two issues on appeal. First, whether the award of *any* alimony was proper, and second, if the plaintiff is entitled to alimony, whether

the type of award fashioned by the lower court is proper.

[1] As to the first issue, whether *any* award of alimony was proper, both parties argued their respective positions on the issue, and the lower court determined that the plaintiff was in need of support of two hundred dollars ($200.00) per month and that the defendant had "unilaterally, and deliberately put himself in a position where he was unable to respond to the support need" of the plaintiff. Pursuant thereto the lower court awarded plaintiff monthly alimony of $200.00 per month and lump sum alimony of $30,000.00, the $200.00 monthly alimony to terminate upon payment of the $30,000.00 lump sum. A review of the record supports the lower court's conclusion that the plaintiff was in need of and entitled to $200.00 per month alimony. Therefore, since the plaintiff was entitled to $200.00 per month alimony, the only issue left for the Court to decide on appeal is whether the $30,000.00 lump sum award was proper.

The defendant contends that the lower court has made a property distribution in contravention of the antenuptial agreement by giving the plaintiff a $30,000.00 award after the lower court found that plaintiff was only entitled to $200.00 a month support. The lower court, on the other hand, called the award a "lump sum alimony" which did not result in a property distribution, but was only in payment of the support obligation.

It is evident from the record, and more particularly the court's Memorandum Decision, that in using the lump sum award the court was essentially attempting to provide a monthly income of $200.00 to the plaintiff. The lower court made the award on the assumption that income from the $30,000.00 would provide the plaintiff with $200.00 per month.[1] Pursuant to that intent the lower court ordered the defendant to pay $200.00 per month, and when the $30,000.00 was paid to secure the monthly amount, the $200.00 per month obligation would cease. Otherwise, the $200.00 per month obligation would be paid until terminated at death or remarriage of plaintiff.

The problem with the $30,000.00 lump sum award as security for the $200.00 monthly support obligation is there was no condition placed on that amount that would require the corpus to revert to the defendant or his estate when the support obligation ceased. In effect, once the lump sum was paid to the plaintiff to secure the $200.00 per month established need for support, it was lost forever to the defendant or his estate in that nothing required the corpus to be returned for any reason.

[2] It is the duty and prerogative of this Court in equity matters, where the occasion warrants,[2] and after a review of both the facts and the law, to fashion its own remedy as a substitute for the judgment of the trial court,[3] but that court's actions should only be disturbed to prevent manifest injustice.[4]

[3] Viewed in that light, it is clear that the $30,000.00 lump sum award violates the antenuptial agreement which only required the defendant to provide for the support needs of the plaintiff, i.e., $200.00 per month. Accordingly, it is the opinion of this Court that the $30,000.00 lump sum award must be conditioned so as to allow the corpus to revert back to the defendant or his estate upon the termination of the defendant's obligation to support the plaintiff.

The Court does not suggest that a lump sum award to secure alimony is improper, only that such an award must revert to the

1. $30,000.00 × 8 (interest on judgment) = $2,400/year. This is equivalent to $200.00 per month.

2. *Jackson v. Jackson*, Utah, 617 P.2d 338 (1980).

3. Article 8, § 9, Constitution of the State of Utah. Rule 72(a), Utah Rules of Civil Procedure.

4. *Reed v. Alvey*, Utah, 610 P.2d 1374 (1980); *Provo City v. Lambert*, Utah, 574 P.2d 727 (1978); *Mitchell v. Mitchell*, Utah, 527 P.2d 1359 (1974).

obligor at the termination of the alimony obligation.

The case is remanded to allow the lower court to rewrite its judgment in accordance with the views of this opinion. No costs awarded.

HALL, C.J., and STEWART, OAKS, and HOWE, JJ., concur.

DURHAM, J., does not participate herein; DEE, District Judge, sat.

William A. LANGLEY, Plaintiff and Appellant,

v.

N.D. "Pete" HAYWARD, Sheriff, Salt Lake County, State of Utah, Defendant and Respondent.

No. 18456.

Supreme Court of Utah.

Dec. 16, 1982.

Petitioner, who was arrested on an extradition warrant for a robbery committed in Idaho, appealed from a judgment of the Third District Court, Salt Lake County, Kenneth Rigtrup, J., denying his habeas corpus petition. The Supreme Court, Oaks, J., held that: (1) district court could not redetermine probable cause for issuance of the underlying arrest warrant; (2) substantial evidence supported district court's finding that petitioner was the person named in the underlying arrest warrant and extradition papers; and (3) record supported district court's findings that petitioner failed to show by clear and convincing evidence that he was not in Idaho when the crime was committed and that documents on file were legally sufficient for the extradition of petitioner to Idaho for trial on the charges named.

Judgment affirmed.

1. Habeas Corpus ⇐92(2)

In evidentiary hearing on habeas petition filed by petitioner, who was arrested on extradition warrant, district court could not redetermine probable cause for issuance of the underlying arrest warrant. U.C.A. 1953, 77–56–1 et seq.

2. Extradition and Detainers ⇐36

Verified complaint sworn before magistrate who made finding of probable cause satisfied statutory requirement that extradition warrant be issued on the basis of an affidavit made before a magistrate. U.C.A. 1953, 77–30–3.

3. Habeas Corpus ⇐92(2)

Claim of mistaken identity was a question that could be raised by habeas corpus in the asylum state.

4. Extradition and Detainers ⇐39

State has a burden of proving that the person arrested is the person named in the extradition papers.

5. Extradition and Detainers ⇐34

State makes a prima facie case that the person arrested is person named in the extradition papers by showing that the arrested person has, or is known by, the same name as that appearing on the extradition papers.

6. Habeas Corpus ⇐85.2(4)

When state has made its prima facie case that the person arrested is the person named in the extradition papers, petitioner has the burden of going forward with affirmative evidence that he is not the person named in the extradition papers.

7. Habeas Corpus ⇐85.8(1)

Where the petitioner, by sworn testimony or by a verified pleading, produces evidence that he is not the person named in the extradition papers and where the state provides no evidence in addition to its bare prima facie case, petitioner is entitled to release.

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ing the adjudicatory stage of a delinquency proceeding, the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Since this case must be reversed and remanded to the juvenile court to make specific findings of fact and conclusions of law, it would be more appropriate that the fact finder assess the evidence in light of the "beyond a reasonable doubt" standard. The judgment of the juvenile court is reversed, and the case is remanded for further proceedings in accordance with this opinion.

HENRIOD, ELLETT, CROCKETT and TUCKETT, JJ., concur.

Delores Blood MITCHELL, Plaintiff and Respondent,

v.

William Keith MITCHELL, Defendant and Appellant.

No. 13565.

Supreme Court of Utah.

Nov. 7, 1974.

Petition to modify alimony and child support payments awarded to wife in decree of divorce. The Third District Court, Salt Lake County, G. Hal Taylor, J., increased amounts of alimony and child support, and husband appealed. The Supreme Court, Callister, C. J., held that where husband-appellant did not include in record on appeal transcript of hearing on petition for modification, presumptions of validity of trial court's determination that there was a substantial change of circumstances justifying increase of support and maintenance payments applied to require affirmance of trial court's order.

Affirmed.

1. Divorce ⇐164, 245(1), 309

Proceeding to modify divorce decree is equitable, and same authority is conferred upon trial court to make subsequent changes as to support and maintenance as it could have dealt with them originally. U.C.A.1953, 30–3–5.

2. Appeal and Error ⇐847(1), 1122(2)

It is both duty and prerogative of Supreme Court in an equitable action to review the law and the facts to make its own findings and substitute its judgment for that of the trial court. Const. art. 8, § 9.

3. Divorce ⇐252, 286(2)

In a divorce action, trial court has considerable latitude of discretion in adjusting financial property interests, and its actions are indulged with a presumption of validity. U.C.A.1953, 30–3–5; Const. art. 8, § 9.

4. Divorce ⇐184(4, 12)

On appeal in a divorce action, burden is on appellant to prove that evidence clearly preponderates against findings as made, that there was a misunderstanding or misapplication of law resulting in substantial prejudicial error, or that serious inequity has resulted so as to manifest a clear abuse of discretion. U.C.A.1953, 30–3–5.

5. Divorce ⇐286(2), 312.6(3)

On appeal in divorce action, where appellant did not include in the record on appeal a transcript of the hearing on petition for modification of alimony and child support payments, presumption of validity of trial court's determination that there was a substantial change of circumstances justifying increase of support and maintenance payments applied to require affirmance of trial court's order. U.C.A.1953, 30–3–5.

Jackson Howard of Howard, Lewis & Petersen, Provo, for defendant and appellant.

Kay M. Lewis of Jensen & Lewis, Salt Lake City, for plaintiff and respondent.

CALLISTER, Chief Justice:

Plaintiff filed a petition to modify the alimony and child support payments awarded to her in a decree of divorce entered in February, 1970. The original decree awarded plaintiff $1 per year alimony and $90 per month for each of five minor children. Upon hearing of the petition, the trial court increased plaintiff's alimony to $100 per month and child support to $150 per child for the four minor children residing with her.

The trial court found that since the time of entry of the original decree, defendant's earnings had increased from a base salary of $13,196 per year plus bonus to a base salary of $19,355 per year; that the cost of living had increased considerably; and that plaintiff's living expenses for herself and minor children had increased to an amount in excess of $800 per month. The trial court concluded that there had been a substantial change of circumstances with a substantial increase in the cost of living, which justified an increment in the award.

Defendant appeals from the order decreeing the aforementioned modification. He contends that the amount of alimony to which plaintiff is entitled should be based upon her station in life at the time the decree of divorce was entered and should not be measured by defendant's present wealth and earning capacity. Defendant claims that the sole ground for modification of alimony was the increase in his income, and such a factor is relevant only insofar as ability to pay is concerned; and that there must be a change of circumstances to justify an increase in alimony. Defendant further urges that there must be a material change of circumstances to modify an award of child support, and such burden was not sustained by plaintiff. Defendant finally contends that in the original decree plaintiff was awarded the family home in lieu of substantial alimony payments, and such a property settlement should be deemed res judicata and held to preclude any subsequent modification of alimony.

Section 30-3-5, U.C.A.1953, as amended 1969, provides:

> When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary.

[1-4] In accordance with this statute, this court has held that a proceeding to modify a divorce decree is equitable and the same authority is conferred upon the trial court to make subsequent changes as respect to support and maintenance as it could have dealt with them originally.[1] Under Article VIII, Section 9, Constitution of Utah, it is both the duty and prerogative of this court in an equitable action to review the law and the facts and make its own findings and substitute its judgment for that of the trial court. However, in a divorce action, the trial court has considerable latitude of discretion in adjusting financial and property interests, and its actions are indulged with a presumption of validity. The burden is upon appellant to prove that the evidence clearly preponderates against the findings as made; or there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or a serious inequity has resulted as to manifest a clear abuse of discretion.[2]

[5] In the instant action, defendant has not included in the record on appeal a transcript of the hearing for the petition for modification. Defendant's points on

1. Harmon v. Harmon, 26 Utah 2d 436, 491 P.2d 231 (1971).

2. Harding v. Harding, 26 Utah 2d 277, 488 P.2d 308 (1971); Searle v. Searle, 522 P.2d 697 (Utah 1974).

appeal involve a factual determination, which this court obviously cannot undertake without a transcript of the hearing. The determination of the trial court that there had been a substantial change of circumstances, which justified the increase of support and maintenance, is presumed valid. This court must assume that the trial court, in evaluating the petition for modification for support, considered the parties' respective economic resources and determined what constituted the equitable share each should contribute to the household to maintain the family according to their station in life.[3]

The order of the trial court is affirmed. Costs are awarded to plaintiff.

HENRIOD, ELLETT, CROCKETT, and TUCKETT, JJ., concur.

3. Ring v. Ring, 29 Utah 2d 436, 511 P.2d 155 (1973).

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SHAW v. JEPPSON.

No. 7711.

Supreme Court of Utah.

Jan. 12, 1952.

Action by Helene Shaw, doing business as Arthur Murray Dance Studio, against Ara M Dimond Jeppson for injunction restraining defendant from teaching dancing in competition with plaintiff. The Third Judicial Court, Salt Lake County, Joseph G. Jeppson, J., entered judgment for plaintiff, and defendant appealed. The Supreme Court, Crockett, J., held that where plaintiff was free to independently manage her own business, fact that she had licensing agreement with foreign corporation for use of its name and methods in teaching of dancing upon compliance with certain requirements and obligations, did not lead to conclusion that such corporation was doing business in State by plaintiff as its agent, but plaintiff was real party in interest and entitled to maintain suit to enjoin defendant in accordance with contract of employment previously entered into between parties by which defendant had agreed to refrain from competition within given area for certain period upon termination of employment.

Judgment affirmed.

1. Appeal and Error ⇐1009(4)

On appeal in case of equitable cognizance, court will review evidence, but it will not disturb findings of trial court unless they are clearly against weight of evidence.[1]

2. Corporations ⇐612(4½), 667½

Where proprietor of dancing studio brought action to enjoin defendant, who was formerly employed as dancing instructor, from teaching of dancing and proprietor had licensing agreement with foreign corporation which permitted her to use name, and methods of licensor, but proprietor was free to independently manage her own business, fact that foreign corporation compelled proprietor to comply with certain requirements and to make payment of percentage of gross receipts as condition to continuing privilege of license, did not compel conclusion that foreign corporation was doing business in state by proprietor as its alter ego or agent and that it was consequently real party in interest.

3. Contracts ⇐330(2)

Where proprietor of dancing studio had licensing agreement with foreign corporation by which proprietor was permitted to use name, dances, instruction books and methods of licensor, with certain obligations and limitations as condition of continuance of rights given by licensing agreement, but proprietor was sole owner of business and was free to independently manage same, fact that licensor might indirectly benefit from proprietor's enforcement of contract by which employee of proprietor was precluded, upon termination of employment, from teaching dancing within given area for period of two years, did not preclude maintenance by proprietor of suit to enforce agreement on her own behalf.

4. Contracts ⇐330(2)

Where there are joint promisees having separate or severable rights, promisees may enforce their rights separately unless some obvious hardship or injustice is wrought by such procedure, and suit by one promisee is permissible even though other promisee may be under disability to sue. U.C.A. 1943, 18-8-1, 18-8-2, 18-8-5.

5. Parties ⇐6(1)

The reason that defendant has right to have cause of action prosecuted by real party in interest is so that judgment will preclude any action on same demand by another, and will permit defendant to assert all defenses or counterclaims available against real owner of cause.

Miner & Jones, Esqs., Salt Lake City, for appellant.

Robert M. Yeates, and Cheney, Marr, Wilkins & Cannon, all of Salt Lake City, for respondent.

CROCKETT, Justice.

Plaintiff procured an injunction against the defendant from teaching dancing in competition with her. The controversy on this appeal is over an effort of the defendant to get another plaintiff in, so she can show it is disqualified from suing her.

Ara M. Dimond (now Jeppson) was hired as a dancing instructor by the plaintiff, Helene Shaw. The contract of employment provided that if she left plaintiff's employ she would not teach nor dance for hire within a certain area, that is, in Salt Lake County, or any county adjacent to it or within 25 miles of any Arthur Murray dance studio for a period of two years; if she breached this covenant, she agreed (1) to pay on demand a promissory note in the sum of $500 as compensation for dancing instruction and training she would receive; and (2) that she recognized that it would cause irreparable injury to the plaintiff's business and consented to an injunction against her breaching said covenant. After approximately one and one-half years employment, she quit without stating any reason therefore and began teaching dancing within the proscribed area.

The plaintiff commenced this action seeking three things: (a) to collect the promissory note, (b) for money damages for violating the covenant, and (c) to enjoin her from continuing to do so. Upon the trial, the parties stipulated that the defendant had breached the covenant; the plaintiff waived any money damages caused prior to the trial; and also waived any right to collect on the promissory note. The only issue presented was as to plaintiff's right to the injunction. The trial court ruled for the plaintiff and entered a decree ordering the defendant to discontinue violation of the covenant. Defendant appeals.

The defendant makes no claim that the restriction is not a reasonable and lawful one and necessary to protect the good will of the plaintiff's business. The only defense she asserts to the action is based on these two propositions: that plaintiff, Helene Shaw, is not the real party in interest but that Arthur Murray, Inc., is such in fact; and that it is a foreign corporation doing business in Utah without complying with Sections 18-8-1 and 2, U.C.A.1943, and is therefore disqualified from suing herein by Section 18-8-5.

Defendant admits that Arthur Murray, Inc. is a foreign corporation and that it has not qualified to do business in the State of Utah and does not dispute that if such corporation were the real party in interest and doing business in the State of Utah it could not maintain this suit. First National Bank of Price v. Parker, 57 Utah 200, 194 P. 661, 12 A.L.R. 1373; Dunn v. Utah Serum Company, 65 Utah 527, 238 P. 245; Franklin Building & Loan Company v. Peppard, 97 Utah 483, 93 P.2d 925.

Consideration of the defendant's challenge that the plaintiff is not the real party in interest in the suit requires a brief, factual survey of the relationship between the parties as shown by the contracts between them and their methods of operation. The plaintiff, Helene Shaw, has a licensing agreement with Arthur Murray, Inc. of New York permitting her to use the name, dances, instruction books and methods of the licensor, but she is obliged to do so within certain limitations. For this she pays 10% of her gross receipts, plus 5% to go into a fund for advertising and certain other contingencies.

The plaintiff is the originator and entrepreneur of the business she is conducting. She filed an affidavit that she personally was doing business under an assumed name, Arthur Murray Studios, and registered that name for herself in the office of the Secretary of State. She procured her own studio, made all the arrangements about rental, utilities and other incidentals which it is her sole responsibility to pay; she owns all of the assets of the business including the furniture, fixtures, files, records and instruction books, the lease, accounts receivable and the licensing agreement referred to. The hiring of personnel, the payment of their salaries and all of the expenses of the business is upon her. In fact, she has full responsibility for managing all phases of the business, arrangements for lessons, group dances, and courses. And it is she who gets the benefits of any profits made or suffers any loss that may be incurred in the business.

It is true that in order to protect the name and good will of the licensor, the licensing agreement places some restric-

1. Stanley v. Stanley, 97 Utah 520, 94 P.2d 465.

tions upon the plaintiff in that Arthur Murray, Inc has the right to make certain requirements with respect to types of dancing taught, the character of the studio, salaries paid and not employing personnel found to be objectionable It also requires plaintiff to keep records and to make reports of a general nature showing the lessons taught and the gross receipts which is the basis of payment for the license This report does not show the wages paid nor the operating expenses in connection with the business because the licensor does not share in the profits and is not responsible for the loss and therefore is not concerned whether the plaintiff's business is profitable or otherwise The contract expressly provides that the licensor is not responsible for salaries or other debts incurred by the plaintiff The evidence is that the licensor has never exercised any of its prerogatives of supervisory control over the plaintiff's business Actually no representative of Arthur Murray, Inc has ever been at the studio The fact is that it has no *direct* supervisory control over the plaintiff's business, the requirements imposed by the agreement are conditions under which the plaintiff can continue to use the name and methods of Arthur Murray, Inc, a breach of which could only become the basis of a cancellation of the license upon certain notice specified in the contract Only in this indirect way of cancelling the license, could licensor interfere with the management and operation of the plaintiff's business

The defendant Ara M Dimond Jeppson is not a party to the license agreement and has no direct contractual relationship with Arthur Murray, Inc The plaintiff hired the defendant, fixed her hours, specified the terms and conditions of employment and set and agreed to pay her salary The defendant's contract with the plaintiff was one of employment for the plaintiff in connection with which the defendant agreed to the covenant we are concerned with The mutual obligations of the contract run between the plaintiff and the defendant, and Arthur Murray, Inc is referred to in it as a third party, and under its provisions, there is no theory upon which the defendant could have held Arthur Murray, Inc responsible for her wages or have imposed any other obligation upon it

Upon the facts as delineated above the court found that the plaintiff was not the alter ego, agent, servant or employee of Arthur Murray, Inc , that such corporation was not doing business in the State of Utah and ruled that the plaintiff in her own right was entitled to enforce the covenant against the defendant and upon such findings granted the injunction.

[1] The phase of this case under review, that is, pertaining to the injunction, is equitable Therefore, although the court will review the evidence, it will not disturb the findings of the trial court unless they are clearly against the weight of the evidence Stanley v Stanley, 97 Utah 520, 94 P 2d 465

[2] Where the plaintiff was thus free to independently manage her own business, the fact that the licensor compelled her to comply with certain requirements as a condition to continuing the privilege of the license, does not lead to the conclusion that the licensor was doing business in the State of Utah by the licensee as its alter ego or agent McMaster, Inc , v. Chevrolet Motor Company, D C , 3 F 2d 469, State v Ford Motor Company, 208 S C 379, 38 S F 2d 242, which latter case distinguishes between doing business in a state in such a manner as to require a corporation to file its articles, pay fees and comply with the statutes to qualify to do business therein, as compared with merely having an agent operating with sufficient authority to render the corporation amenable to service of process on him such as in International Text Book Company v Pigg, 217 U S 91, 30 S Ct 481, 54 L Ed 678, cited by plaintiff, where a corporation was held to be doing business in Kansas through its agent who maintained an office, sold correspondence courses, collected and remitted fees, made daily reports, received a regular salary and where many people were currently taking courses

Defendant claims that Golden v American Keene Cement & Plaster Company, 98 Utah 23, 95 P 2d 755, is a case squarely

in point for her Golden attempted to foreclose a mortgage which had been taken in his name, it appearing that he was in fact merely the alter ego of California Stucco Products Company, a foreign corporation There is a significant and controlling difference· Golden had no personal interest in the cause of action whatsoever, such as Mrs Shaw has in the instant case.

There is no necessity for indulging in niceties as to whether the plaintiff may be an agent of Arthur Murray, Inc for some purposes, as that is immaterial to the issues in this case.

[3, 4] Insofar as her right to sue is concerned, the determination made is amply justified The plaintiff as the owner of the business exacted this covenant from the defendant for the purpose of protecting her own interests She is entitled to enforce it on her own behalf She would not be precluded from doing so merely because a foreign corporation, disqualified from suing, might also have an interest in the contract and may incidentally derive an indirect benefit from plaintiff's enforcement of her own rights

The situation would be different if Arthur Murray, Inc were suing But it is not, and is seeking nothing in this action Whether it could or could not enforce this covenant, were it qualified to sue, is of no instant concern Under modern law there is no question but that where there are joint promisees, having separate or severable rights, they may enforce their rights separately unless some obvious hardship or injustice is wrought by such procedure, see Vol 4 Corbin on Contracts, Secs 939 and 940 and numerous cases there cited under Note 74 The author states in Sec 939 "* * * Even if it is a single and individual performance that is promised to two or more promisees, and the promise contains no words of 'severance', if breach of the promise causes separate and distinct injuries to the promisees, justice and convenience may at times be served by permitting them to maintain separate actions for damages * * *"

Suit by one promisee is permissible although the other may be under a disability to sue It seems obvious that one who has a right violated, should not be prevented from redress merely because another, who may be disqualified or unavailable in the suit, may share the right In the case of Hoyt v New Hampshire Fire Ins Co , 92 N H 242, 29 A 2d 121, 148 A L R 484, three owners of undivided interests in property were insured against fire by a single policy, it was held that two of them could recover the amount of their loss according to their interest, even though the third set the fire himself and could recover nothing See also Satler Lumber Co v Exler, 239 Pa 135, 86 A 793

[5] The reason the defendant has the right to have a cause of action prosecuted by the real party in interest is so that the judgment will preclude any action on the same demand by another and permit the defendant to assert all defenses or counter claims available against the real owner of the cause Chickasaw Lumber Co v Kunkel, 183 Okl 347, 82 P 2d 1003, Meyers v Bank of America Nat Trust & Savings Ass'n, Cal App , 69 P 2d 868, subsequent opinion, 11 Cal 2d 92, 77 P 2d 1081 Defendant will suffer no difficulty in this case on that score Her attempt to make Arthur Murray, Inc the plaintiff in this case is not to guard against any such disadvantage, but such effort is apparently so she could then contend that the action may not be maintained against her It is obvious that plaintiff is much more vitally and directly affected by defendant teaching dancing in Salt Lake County in violation of the covenant than is Arthur Murray, Inc The trial court correctly ruled that she was entitled to the injunction on her own behalf

Judgment affirmed Costs to respondent.

WADE, McDONOUGH and HENRIOD, JJ , concur.

WOLFE, Chief Justice (concurring in part—dissenting in part).

My concurrence is limited to the reason stated by the majority opinion that "The plaintiff as the owner of the business exacted this covenant from the defendant for the purpose of protecting her own interests.

She is entitled to enforce it on her own behalf" In Allen v Rose Park Pharmacy, Utah, 1951, 237 P 2d 823, 826, we held "Restrictive covenants are generally upheld by the courts where they are necessary for the protection of the business * * * and no greater restraint is imposed than is reasonably necessary to secure such protection"

But I am not prepared to concur in the inference stated in the majority opinion that Arthur Murray, Inc of New York City and Helene Shaw, d/b/a Arthur Murray Dance Studio of Salt Lake City, are joint promisees The contract here being sued upon is a contract of employment signed by Helene Shaw and Ara M Dimond [now Jeppson] It was apparently drafted by Arthur Murray, Inc and the restrictive covenant here being enforced was obviously included for the protection of Arthur Murray, Inc as well as Helene Shaw Arthur Murray, Inc may be a third party beneficiary, but it is not clear to me that it is a primary party to the Shaw-Jeppson contract To so infer seems unnecessary to this decision This proposition is not mentioned in the briefs.

BATES v. SIMPSON et al.
No. 7686.

Supreme Court of Utah
Jan 11, 1952

Haskell N Bates sued Jimmie Simpson W J Saunders, and the Employers Liability Assurance Corporation Ltd for losses sustained by reason of Jimmie Simpson's failure to procure title to an automobile he had sold to plaintiff Saunders filed a cross complaint against the corporation, as surety on Simpson's bond, for losses sustained by Saunders when Simpson failed to acquire title to the automobile for plaintiff with the proceeds of loan procured by Saunders, at Simpson's request, by pledging the automobile to a finance company as security The corporation filed a cross complaint against Saunders basing its claim to indemnification upon an alleged joint adventure relationship between Simpson and Saunders The Third District Court, Salt Lake County, Ray Van Cott, Jr, J, awarded judgment against the surety, in favor of both plaintiff and Saunders, and the surety appealed The Supreme Court, Wolfe C J held inter alia that there was no legal theory upon which Simpson's fraudulent acts could be imputed to Saunders, but that the trial court had erred in including the same item of damages in both its award to plaintiff and its award to Saunders

Remanded with directions

1 Licenses ⇐26

In buyer's action and financier's cross-action against seller's surety for losses sustained when seller failed to use proceeds of loan, procured by financier at seller's request, to acquire title to automobile for buyer, it was error to require surety to pay both to buyer and financier, as item of damages, amount of cash deposited by buyer with seller to cover sales tax and fee for license plates

2. Joint Adventures ⇐1 1, 1 2

A joint adventure is in nature of partnership, and to establish joint adventure there must be agreement, express or implied, for sharing of profits [1]

3 Joint Adventures ⇐1 12

Seller's profit on sale of automobile and earnings of individual who financed transaction, which earnings took form of reserve credited to such individual's account with finance company, were two different things, and fact that such individual realized profit in form of accumulated reserve with finance company did not make such individual's relationship with seller one of joint adventure

4. Joint Adventures ⇐1.12

Fact that two independently licensed used automobile dealers shared a lot, the building thereon and its furnishings, and

1. Wasatch Livestock Loan Co v Lewis & Sharp, 84 Utah 347, 35 P 2d 835; Kaumans v White Star Gas & Oil Co, 92 Utah 24, 63 P 2d 231

Tab O

EXHIBIT O

18 Utah 2d 55

Catherine Deon ALBRECHTSEN, Plaintiff and Appellant,

v.

Ray H. ALBRECHTSEN, Defendant and Respondent.

No. 10468.

Supreme Court of Utah.

June 3, 1966

The Third District Court, Salt Lake County, Marcellus K Snow, J, entered an order quashing a writ of garnishment, and an appeal was taken The Supreme Court, Wade, J, held that proper procedure would have been for wife's attorney to intervene in her divorce action to have amount and extent of his attorney's lien determined and lien enforced, and having failed to intervene, he had no standing to appeal from action of court in garnishment proceeding brought in that case, even though motion to quash writ was supported by wife's affidavit that issuance of writ had not been authorized by her and that attorney had been paid.

Attempted appeal dismissed

Divorce ⇐178

Proper procedure would have been for wife's attorney to intervene in her divorce action to have amount and extent of his attorney's lien determined and lien enforced, and having failed to intervene, he had no standing to appeal from action of court in garnishment proceeding brought in that case, even though motion to quash writ was supported by wife's affidavit that issuance of writ had not been authorized by her and that attorney had been paid Rules of Civil Procedure, rule 73(a)

Stephen I Johnston, Salt Lake City, for appellant

Leon Halgren, Salt Lake City, for respondent.

WADE, Justice

This is an appeal from an order quashing a writ of garnishment, issued and served upon the employer of Ray H Albrechtsen by the attorney who had obtained a divorce from him, for Catherine Deon Albrechtsen, in which suit she had been awarded a sum of $250 for attorney's fees

We have not been favored with a brief from respondent However, from the record it appears that defendant and respondent herein, Ray H Albrechtsen, filed a motion to quash the writ of garnishment The motion was supported by the affidavit of his former wife that the attorney who caused the writ to be issued and served no longer represents her in this case; that the issuance of the writ was not authorized by her, and further, that he had been paid the full amount of attorney's fees he had agreed to accept for his services to obtain the divorce

After a hearing upon the motion to quash the writ of garnishment the motion was granted and an order entered quashing the writ This appeal is brought by the attorney who represented Catherine Deon Albrechtsen in the above entitled action In his brief the attorney denies that he has been fully paid according to the contract between himself and his former client and contends that he had the right to have the writ issued because he had an attorney's lien on the judgment The record does not disclose any proceedings taken or even an application to the court by this attorney to intervene in the above entitled action to enforce an attorney's lien for his fees where the amount and extent of his lien, if any, could have been determined Such would have been the proper procedure [1] It is reasonable to assume that the plaintiff in the above entitled case, who denies that she authorized the garnishment proceedings against her former husband, is not appealing from the judgment of the court quashing those proceedings Her former attorney, having failed to intervene as a party in the original action for divorce to enforce any lien he may have for services rendered in that case, has no standing to appeal from the action of the court in the garnishment proceedings [2] brought in that case.

The attempted appeal is dismissed

HENRIOD, C. J., and McDONOUGH, CROCKETT, and CALLISTER, JJ., concur.

1 7 Am Jur 2d p 215, § 304; Kourbetis v Nat'l Copper Bank of Salt Lake City, 71 Utah 232, p 238, 264 P 724.

2. Rule 73(a) U R C P.

Tab P

EXHIBIT P

and 2, the written contract was not an integration as to this subject Therefore, whether the $17,000 was agreed to be repayable by Ipsen and thus an "indebtedness" for which Stanger would be liable became a question of fact and parol evidence was admissible While the evidence was conflicting, Stanger adduced testimony that the president and vice president of Sentinel stated before the first payment was made to Ipsen that it was not repayable because it was intended to assist him in changing employers and to further the development of Sentinel s business in Arizona There being competent evidence to support the jury s finding on this issue, we will not disturb it Moreover, there was also testimony that Ipsen was not Stanger's subagent at the time the payments were made and therefore the debiting of Stanger's account would be improper under the Stanger Contract

[10] (4) *$13,628 85, representing Anderson's share of debit created while operating under the SMG Contract* At the trial the president of Sentinel agreed with Stanger and Anderson that the repayment of this amount was expressly covered by the Modification Agreement of January 13, 1969, and that under the terms thereof only premiums paid on sales of insurance under the SMG Contract prior to 1969 would be used to reduce and eventually eliminate Anderson s debit balance The $13,628 85 withheld from the "001" account represented, according to the breakdown provided by Sentinel, Anderson's share of debit created while a partner under the SMG Contract In view of this recognition by Sentinel, the trial court could have ruled as a matter of law that Sentinel's withholding of this amount was improper

In sum, it was proper to admit parol evidence extrinsic to the Stanger Contract and the evidence so admitted clearly supports the factual findings of the jury that Sentinel had no contractual rights to withhold any of the sums hereinabove referred to from Stanger for the reasons we have given As to Anderson, Sentinel conceded it was not permitted to charge the "001" account for funds advanced him during the initial four year period of his relationship with Sentinel The jury observed the witnesses, heard their testimony, and it was their exclusive province to weigh the evidence in deciding in favor of one side or the other

We have reviewed Sentinel's contention with respect to the jury instruction on Sentinel's first lien right on all commissions for debts due and the issues of estoppel and waiver Inasmuch as the jury found, and we have affirmed their finding, that Sentinel had no contractual right to sums withheld from commissions, that finding is dispositive of this appeal and we deem it unnecessary to address those issues

[11] One point, however, remains to be addressed As noted above, the jury utilized Sentinel's calculation of amounts withheld from commissions to arrive at an award of damages of $27,016 40 to each Anderson and Stanger, based upon the total of $54,032 80 shown in the above letter exhibit In fact, the correct total was $61,032 80, which would make a total award of $30,516 40 to each of the two plaintiffs Under Rule 60(a) of the Utah Rules of Civil Procedure, the trial court may correct clerical mistakes in judgments at any time See also *Bagnall v Suburbia & Co*, Utah, 579 P 2d 917 (1978) In explanation of the intent of the identical Federal Rule of Civil Procedure, the comment has been made that "in this broad approach to correctibility under Rule 60(a), it matters little whether an error was made by the court, clerk, the jury foreman, counsel, a party, or the judge himself, so long as it is clearly a formal error that should be corrected in the interest of having judgment, order, or other part of the record reflect what was done or intended" Annot, 13 A L R Fed 794 (1972) The definition of "clerical mistake" thus extends to include the one here discovered "It is a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney" *In Re Merry Queen Transfer Corp*, 266 F Supp 605, 607 (1967) Our instruction to the district court to correct the incorrect total amount of judgment, where the mistake is clear from the record, reflects no more than what plaintiffs are entitled to under the verdict Accord *Fay v Harris*, 64 Ariz 10, 164 P 2d 860 (1945)

The judgment on the special verdicts is affirmed in all respects The case is remanded to the trial court for the limited purpose of correcting the amount of damages to reflect an award of $30,516 40 to each of the plaintiffs Costs awarded to plaintiffs

HALL, C J , STEWART and OAKS, JJ , and DAVID SAM, District Judge, concur

DURHAM, J , does not participate herein

DAVID SAM, District Judge, sat

Brett W NELSON, Plaintiff and Respondent,

v.

Jeff JACOBSEN, Defendant and Appellant.

No 17667.

Supreme Court of Utah

Aug 31, 1983

Action was instituted for alleged alienation of wife's affections The Sixth District Court, Sanpete County, Don V Tibbs, J , entered judgment for plaintiff, and defendant appealed The Supreme Court, Oaks, J , held that (1) notice of trial described nature of proceedings against unrepresented defendant in such ambiguous terms that it deprived him of adequate time to prepare for his defense in violation of his right to due process, (2) an action for alienation of affections was still a viable cause of action in Utah, but in order for plaintiff to recover, it was necessary to establish that causal effect of defendant's conduct outweighed combined effect of all other causes, including conduct of plaintiff and alienated spouse, (3) punitive damages were recoverable as long as plaintiff showed circumstances of aggravation in addition to malice implied by law from conduct of defendant in causing separation of plaintiff and his spouse, and (4) an award of punitive damages could not be entered, however, without first adducing evidence or making findings of fact with regard to defendant's net worth or income

Reversed and remanded

Hall, C J , and Stewart, J , concurred in part and dissented in part and filed separate opinions

Durham, J , concurred in result and dissented in part and filed opinion

1 Constitutional Law ⇐251 6

A party is deprived of due process where notice is ambiguous or inadequate to inform a party of nature of proceeding against him or is not given sufficiently in advance of proceeding to permit preparation U S C A Const Amend 14

2 Constitutional Law ⇐251 6

To satisfy an essential requisite of procedural due process, a "hearing' must be prefaced by timely notice which adequately informs the parties of the specific issues they must prepare to meet U S C A Const Amend 14

3. Constitutional Law ⇐251 5

"Due process" is not a technical concept that can be reduced to a formula with a fixed content unrelated to time, place, and circumstances, but is a concept which rests upon basic fairness and demands a procedure that is appropriate to case and just to parties involved U S C A Const Amend 14

See publication Words and Phrases for other judicial constructions and definitions

4 Constitutional Law ⇐314

Notice of trial given an unrepresented defendant in form of an oral statement that case had been set for "hearing" two weeks later was not a clear notice that defendant, who was uneducated and inexperienced, had to be ready for "trial" on that date and, hence, was so ambiguous as to deprive defendant of adequate time to prepare his defense in violation of his constitutional right to due process U S C A Const Amend 14

5 Attorney and Client ⇐62

A layman is entitled to undertake his own representation, but due to his lack of technical knowledge of law and procedure, he should be accorded every consideration that may reasonably be indulged and, though this would not include interrupting course of proceedings to translate legal terms, explain legal rules, or otherwise attempting to redress ongoing consequences of layman's decision to function in a capacity for which he was not trained, it would include informing layman of date of trial more than two days before it was to begin and advising him of such matters as his right to a trial by jury and right to require any previously retained counsel to provide case file and other documents whose preparation had been covered by prior representation U S C A Const Amend 14

6 Husband and Wife ⇐324, 325

Right to recover for alienation of affections now extends to both spouses equally and, rather than being based on premise that either spouse constitutes the "property" of the other, is based on the premise that each spouse has a valuable interest in the marriage relationship, including its intimacy, companionship, support, duties, and affection

7 Husband and Wife ⇐322

A suit for alienation of affections does not attempt to "preserve" or "protect" a marriage from interference, but serves only to compensate a spouse who has sustained loss and injury to his or her marital relationship through the intentional interference of a third party

8 Husband and Wife ⇐323

Even if some alienation actions are motivated primarily by spite or extortion, there is no basis on which to abolish cause of action altogether, since a plaintiff who institutes a groundless or collusive suit is subject to a suit or counterclaim for abuse of process or malicious prosecution, and there can be no recovery against a defendant whose conduct is blameless or merely negligent

9 Husband and Wife ⇐322

An action for alienation of affections is an intentional tort and, if defendant has actual notice of marriage, his or her continued overtures or sexual liaisons can be construed as something akin to an assumption of risk that his or her conduct will injure the marriage and give rise to an action

10. Constitutional Law ⇐82(10)

An action for alienation of affections does not unconstitutionally interfere with a defendant's right of privacy in area of personal and sexual relationships between individuals since sexual relations are not a necessary element of such an action and, as between two private individuals, a defendant's claim to sexual and reproductive privacy is no greater than the plaintiff's U S C A Const Amend 14

11 Husband and Wife ⇐334(1)

Recovery in an action for alienation of affections cannot be denied when fact of injury or loss can be proved simply because there is difficulty in assessing amount of that injury or loss

12. Husband and Wife ⇐334(1)

Rule affirming availability of a cause of action for alienation of affections despite uncertainties in assessment of damages is implemented in context of appropriate jury instructions and court's power to require remittitur to restrain or reduce arbitrary or excessive jury verdicts Rules Civ Proc, Rule 59(a)(5)

13 Husband and Wife ⇐334(1)

It would be unjust to refuse to try to measure the effect of a third party's intrusion in a marriage in an action for alienation of affections just because the parties to the marriage share some of the responsibility for its demise

14 Husband and Wife ⇐326

A recovery may not be had in action for alienation of affections if the acts or conduct of the plaintiff himself, or any other cause than the acts of the defendant, constituted the controlling cause of plaintiff's loss of affections

15 Husband and Wife ⇐323

An action for alienation of affections is still a viable cause of action in Utah, but in order to recover, the plaintiff must show that the defendant's acts constituted the "controlling cause" of the alienation of affections, that is, that the causal effect of the defendant's conduct outweighed the combined effect of all other causes, including the conduct of the plaintiff and the alienated spouse

16 Husband and Wife ⇐322

A defendant sued for alienation of affections is properly chargeable with the effect of mere acquiescence in the overtures of the alienated spouse where the defendant knows or has reason to know that such acquiescence will damage the marital relationship

17. Husband and Wife ⇐334(1)

In trying to make the damages "proportionate" to the loss of the injured spouse in an action for alienation of affections, the trier of fact should consider the duration and quality of the marriage relation, including the extent to which genuine feelings of love and affection existed between the spouses prior to the intervention of the defendant

18. Husband and Wife ⇐332

Fact of marriage, plus assertion that defendant willfully and intentionally alienated affections of plaintiff's spouse, resulting in loss of comfort, society and consortium of wife, are essential allegations of a cause of action for alienation of affections and, if punitive damages are sought, malice must also be alleged

19 Husband and Wife ⇐334(2)

In order to recover punitive damages for the tort of alienation of affections, the plaintiff must show circumstances of aggravation in addition to the malice implied by law from the conduct of the defendant in causing the separation of the plaintiff and his or her spouse which was necessary to sustain a recovery of compensatory damages

20. Damages ⇐171

An award of punitive damages requires consideration of many factors, but since it is primarily intended to punish defendant and thereby deter others similarly situated from imitating his conduct, defendant's net worth and income must be considered in determining amount of punitive damages

21 Husband and Wife ⇐334(2)

An award of punitive damages should not be entered in an action for alienation of affections without adducing evidence or making findings of fact with regard to defendant's net worth or income

— —

Craig M Snyder, Provo, for defendant and appellant

K L McIff, Richfield for plaintiff and respondent

OAKS, Justice

In a bench trial of this action for alienation of a wife's affections, the plaintiff husband obtained a judgment of $84,600 against a defendant who was unrepresented by counsel On appeal, defendant seeks judgment notwithstanding the verdict or a new trial

Plaintiff and Brenda Nelson were married July 15, 1978 He was 21 years old, she was 18 They lived in Salina From the beginning, their marriage was characterized by turmoil and violence Brenda testified that plaintiff frequently came home drunk and abused her physically and verbally His heavy drinking led to numerous confrontations with the police, including two arrests for drunk driving She also

drank Within two months of marriage, and long before either party knew defendant, plaintiff told Brenda he wanted a divorce

Brenda Nelson first met defendant in the fall of 1978 in the Safari Motel and Cafe, which defendant managed for his parents Defendant, who had been divorced, was then 31 Plaintiff met defendant in January 1979 The three became friends

Brenda initiated most of the contact between herself and defendant She first made sexual advances toward him at a party in January 1979, but they were unreciprocated at that time In the next six months, she frequently visited defendant at his home in Axtell, "depend[ing] on [plaintiff's] work schedule," and she and defendant sometimes drove around together in her truck

Plaintiff first became aware of Brenda's involvement with defendant in early June 1979 Twice he came home early from his night shift at the coal mine and discovered them together The second discovery gave rise to a discussion that ultimately involved both spouses' parents, during which Brenda admitted seeing defendant and promised to stop In late June, she talked with defendant at a beer party Seeing this, plaintiff dragged her behind his truck and began beating her When defendant intervened, a fight ensued between plaintiff and defendant in which plaintiff was injured

Plaintiff quit the coal mine in July and took a job with a trucking company in order to spend more time with Brenda About three weeks later, Brenda asked him to give her 17 year old friend a ride home to Richfield on his way to work the night shift Rather than driving the girl home, plaintiff bought four six packs of beer, which the two drank as they drove around in his company truck Plaintiff made sexual advances toward her The two were seen together, and when plaintiff arrived at work he was summarily fired for drinking and having an underage passenger in his truck Returning home late that night, still very drunk, he awakened Brenda with his shouting and cursing While repeatedly pegging his hunting knife into the floor, he threatened to break every bone in her body if she didn't call her father to come for her Brenda went to stay with her parents for a week When the couple reconciled, Brenda's father counseled them both to stop drinking if they wanted to save their marriage

Plaintiff's parents testified that plaintiff became despondent and withdrawn after he discovered Brenda's involvement with defendant, and that his drinking also increased After being fired, plaintiff worked irregularly driving trucks for various construction companies, but he was unemployed for lengthy periods, and his income fell to half of its prior level

In August 1979, Brenda told plaintiff she wanted time to think about their marital problems She persuaded defendant to take her with him to Las Vegas, where they stayed overnight Defendant testified that Brenda slept in a motel while he gambled all night in a casino (Defendant testified that his relationship with Brenda did not become romantic until several months after plaintiff and Brenda were divorced, October 31, 1979)

Upon her return, Brenda told plaintiff she thought they could make their marriage work, and they continued to live together In late August, in response to plaintiff's questioning, Brenda admitted that she and defendant had had sexual intercourse "probably around" eight to twelve times Enraged, plaintiff gave her an especially vicious beating Injured and suffering, Brenda went to defendant's home for a few days and then to her parents'

Within a week, Brenda returned to plaintiff and agreed to try again to make the marriage work on condition that the drinking and beating stop However, she testified, plaintiff's promises were not kept and after many attempts to mend her marriage she finally left plaintiff because of his drinking and his physical abuse of her

Plaintiff testified that although Brenda came back to him in September, she seemed "as if she had given up" on the marriage

In October 1979, the couple fought at a party when Brenda discovered plaintiff in the kitchen with another woman Later that month, Brenda moved out for the last time and went to live with defendant They were married October 1, 1980

Plaintiff commenced this action on September 27, 1979 Defendant had only a limited education and no prior experience in legal proceedings On the recommendation of a friend, he retained a Salt Lake City attorney to represent him Defendant paid this attorney a retainer of $500 and an additional $6,500, which the attorney said he would hold in trust to pay additional attorney fees and to negotiate a settlement The remainder was to be refunded to defendant Between March and July 1980, the case was set for trial then changed to a pretrial hearing, which was twice vacated and rescheduled while the parties attempted to negotiate a settlement After reaching a tentative settlement, the parties stipulated on July 29, 1980, to a dismissal of plaintiff's complaint with prejudice This dismissal was entered Defendant's attorney advised that the settlement amount was $5,000 and asked defendant to send the money When asked why he did not pay this amount out of the trust fund, the attorney replied that his legal fees had depleted almost the entire $7,000 previously paid Defendant protested that he did not have an additional $5,000 The attorney told him he would not continue to represent him without payment of additional attorney fees to cover the cost of trial, but that if defendant would discharge him he would refund $1,300 from the trust fund The attorney also advised that defendant could settle the case himself either by giving plaintiff a promissory note for the $5,000 settlement amount or by negotiating his own settlement

Defendant dismissed his attorney and demanded delivery of his file in the case, including copies of all correspondence and pleadings and the depositions of both plaintiff and defendant Defendant represents that his attorney never sent him the case file and that the attorney did not advise him concerning his rights as a litigant, the risks of representing himself, or the possible consequences of the attorney's withdrawal The attorney withdrew with court approval in early September 1980 and refunded $1,300 to defendant

No further proceedings were initiated by either party for a period of four months, during which defendant neither executed a note nor paid plaintiff any money toward the settlement Thereafter, the settlement agreement having failed, plaintiff petitioned the district court to set aside its earlier order of dismissal, reinstate the action, and set it for nonjury trial Having been duly notified, defendant attended the hearing without counsel The petition was granted, and the case was set for nonjury trial two weeks later

The case was tried on January 21, 1981 Defendant attempted to represent himself at trial The total judgment taken against him was $84,600 $59,600 for past and future loss of consortium and $25,000 in punitive damages Defendant's timely motions for a new trial and for judgment notwithstanding the verdict were both denied, and this appeal followed

I FAIRNESS OF TRIAL

Defendant contends that his motion for a new trial should have been granted because he was denied due process of law in the proceedings by not being given adequate and timely notice of trial[1]

[1] Timely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness *Worrall v. Ogden City Fire Department*, Utah, 616 P.2d 598, 601-02 (1980), *Goss v. Lopez*, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975) The much-cited case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70

1 Defendant also urges error in plaintiff's failure to give him the statutory notice either to appoint another attorney or appear in person U.C.A. 1953 § 78-51-36 In the view we take of this case we need not reach that contention

S Ct 652, 657, 94 L Ed 865 (1950), sets out the classic requirements of adequate notice

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance [Citations omitted]

Many cases have held that where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him or not given sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process *Graham v Sawaya*, Utah, 632 P 2d 851 (1981), *Uhler v Secretary of Health & Mental Hygiene*, 45 Md App 282, 412 A 2d 1287 (1980), *Myers v Moreno*, Mo App , 564 S W 2d 83 (1978)

Applying these standards to the record in this case, we conclude that the notice of trial was constitutionally deficient as to this unrepresented defendant because it described the nature of the proceedings against him in such ambiguous terms that it deprived him of adequate time to prepare his defense

Plaintiff's petition to set aside the earlier dismissal and reinstate the lawsuit was filed on December 26, 1980 The petition was heard on January 7, 1981 Defendant was present in the courtroom without counsel, plaintiff's counsel was temporarily absent The record of the hearing reads as follows

> The Court We are now on Civil 7928, *Nelson vs Jacobsen* Is [plaintiff's counsel] here?
>
> The Clerk No, Your Honor
>
> The Court Well, I'm going to set this case *for hearing* on January 21st at 10 00 a m , following the Law and Motion matters You notify [plaintiff's counsel] accordingly [Emphasis added]

The district court then proceeded to other cases, and defendant left the courtroom [2] The minute entry, dated January 8, 1981, states that "[p]laintiff's motion is granted and this matter is set for hearing on Jan 21st, 1981, to follow the Law and Motion Calendar as a non-jury trial" But there is no indication in the record that defendant ever saw or received a copy of the minute order Hence, we must assume that the only notice defendant received at this time was the district court's oral statement that the case had been set for "hearing" two weeks later

The order of reinstatement scheduling the case for trial on January 21 was executed January 14 and mailed to defendant January 15, 1981 On that same day, the court clerk sent defendant a separate notice that the matter was set for trial six days later Defendant received the order and the notice on January 19, just two days before trial The record indicates that the receipt of these documents constituted defendant's first notice that the January 21 event was to be a full scale "trial," rather than a "hearing" Exactly two weeks after the lawsuit was reinstated and two days after he received notice of the date of trial, the case went to trial Defendant represented himself The court awarded a judgment against defendant for $84,600

2 Approximately twenty minutes later plaintiff's counsel entered the courtroom and the following transpired

> [Plaintiff's counsel] Your Honor I was outside Did you set 7928 Nelson v Jacobsen?
> The Court Did I set that one Carole?
> The Clerk Yes Your Honor You set it for January 21st
> [Plaintiff's counsel] Well I wasn t here so I didn t know
> The Court I set the matter for January 21st at 10 00 a m to follow the Law and Motion matters [To the clerk] [W]ill you please notify the Defendar of this hearing so he will know that the matter is set
> The Clerk I think his counsel has been dismissed
> The Court Well then notify him at his address in Salina or wherever he lives

[2] "To satisfy an essential requisite of procedural due process, a 'hearing' must be prefaced by timely notice which adequately *informs the parties of the specific issues* they must prepare to meet" *State v Gibbs*, 94 Idaho 908, 914, 500 P 2d 209, 215 (1972) In cases where the notice is ambiguous or misleading, courts have found a denial of due process In *Watson v Washington Preferred Life Insurance Co*, 81 Wash 2d 403, 502 P 2d 1016 (1972) (en banc), notice of a shareholders' meeting "[t]o consider and vote upon a plan and agreement of merger [and to] transact other business" was held constitutionally inadequate and violative of due process because it failed to inform shareholders that those not receiving the mailed notice would be treated as "missing shareholders" and that, should they fail to appear at the shareholders' meeting, the court would appoint, ex parte, a representative to vote their shares 502 P 2d at 1020 Similarly, in *City and County of Denver v Eggert*, Colo , 647 P 2d 216 (1982) (en banc), the Colorado Supreme Court held violative of due process notice of a "hearing to allow information regarding [a] landfill operation to be made public in the interests of the health, safety, and welfare of [the county's] citizens" where it was clear from the record that the plaintiff-city and its contractors "had no idea that the result of the hearing would be a cease and desist order effective almost immediately" against them 647 P 2d at 223 24 Finally, in *State v Gibbs*, *supra*, the court held that an order waiving juvenile jurisdiction and binding the juvenile over for trial as an adult violated the juvenile's due process rights where it resulted from notice which contained only allegations of the juvenile's unlawful acts and made no mention that a primary purpose of the "interviews" with a magistrate was to determine whether juvenile jurisdiction should be waived

[3] "Due process" is not a technical concept that can be reduced to a formula with a fixed content unrelated to time, place, and circumstances Rather, "the demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved" *Rupp v Grantsville City*, Utah, 610 P 2d 338, 341 (1980)

[4] To a member of the bar or even to a layperson experienced with trial proceedings, setting a case for "hearing" could have been understood as setting a case for "trial" But to this uneducated and inexperienced defendant, a setting for "hearing" was not a clear notice that the defendant had to be ready for trial on that date Indeed, defendant had earlier attended one "hearing" in which plaintiff's petition to reinstate was granted without evidence or discussion, without requiring that plaintiff or his counsel be present and without requiring any participation by defendant Based on his experience at this earlier hearing, defendant could reasonably have concluded that the "hearing" set for January 21 would also be routine

[5] Defendant was entitled to undertake his own representation U C A , 1953 § 78 51 25, *Heathman v Hatch*, 13 Utah 2d 266 268, 372 P 2d 990, 991 (1962) As a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar, *Manka v Martin*, 200 Colo 260, 614 P 2d 875, 880 (1980) (en banc), *cert denied*, 450 U S 913 101 S Ct 1354, 67 L Ed 2d 338 (1981), *Johnson v Aetna Casualty & Surety Co*, Wyo , 630 P 2d 514, 517, *cert denied*, 454 U S 1118, 102 S Ct 961, 71 L Ed 2d 105 (1981), *Smith v Rabb*, 95 Ariz 49, 53, 386 P 2d 649, 652 (1963)

At the same time, we have also cautioned that "because of his lack of technical knowledge of law and procedure [a layman acting as his own attorney] should be accorded every consideration that may reasonably be indulged" *Heathman v Hatch*, 13 Utah 2d at 268, 372 P 2d at 991 Reasonable consideration for a layman acting as his own attorney does not require the court to interrupt the course of proceedings to translate legal terms, explain legal rules, or otherwise attempt to redress the ongoing consequences of the party's decision to function in a capacity for which he is not trained Judges cannot be expected to perform that

function In this case, the trial judge was as considerate and helpful as he could be expected to be during the course of the trial.

The deficiency in this case concerns what happened before the trial. The vulnerability of a layman who is unrepresented as he approaches a trial of the legal and factual complexity of this case requires more judicial consideration than was extended here. Most importantly, defendant was not clearly informed of the date of trial until two days before it was to begin. That deficiency jeopardized one of the most important ingredients of due process: time to prepare a defense. In addition, in view of the nature of this action the court should have advised the defendant prior to trial of his right to a trial by jury. And, in view of the fact that defendant had previously been represented by retained counsel whom he had discharged, the court might also have taken steps to assure that defendant was advised of his right to require that counsel to provide the case file and other documents whose preparation had been covered by the prior representation In this case, plaintiff's counsel repeatedly used defendant's deposition to impeach him during trial. Defendant apparently had no copy of that deposition or of his former counsel's deposition of plaintiff for study prior to the trial.

In all the circumstances of this case, we conclude that it was fundamentally unfair to put defendant to trial on January 21 without counsel and without the other pretrial advice described here. The judgment must therefore be reversed and the cause remanded for a new trial.

II. CAUSE OF ACTION FOR ALIENATION OF AFFECTIONS

Most of the briefing on this appeal concerns the issue posed by the motion for judgment notwithstanding the verdict. Defendant urges us to abolish the cause of action for alienation of affections. We rule on this issue for the guidance of the district court on remand. Notwithstanding the public policy grounds defendant advances, we choose to retain this cause of action for the reasons and with the limitations outlined below.

We have had no occasion for an in-depth consideration of the common-law cause of action for alienation of affections for nearly thirty years. During that time, as defendant notes, this cause of action has fallen from favor and has been abolished or restricted in a majority of jurisdictions. Eighteen states and the District of Columbia have abolished this cause of action by statute.[3] Two other states have abolished it by judicial decision.[4] Six jurisdictions have statutes abolishing the cause of action for money damages at law, but permitting suits for injunctive relief in equity.[5] The statutes of two additional states have abolished the cause of action for alienation of affections with only insignificant exceptions.[6] The appellate courts of three other

3. Ariz Rev Stat Ann § 25 341 (Supp 1982 1983), Cal Civ Code § 43 5 (West 1982), Colo Rev Stat § 13 20 202 (1973), Conn Gen Stat § 52 572b (1983), Del Code Ann tit 10, § 3924 (1974), D C Code § 16-923 (Supp 1978), Ga Code Ann § 30 109 1 (1980), Ind Code Ann § 34 4 4 1 (Burns Supp 1982), Me Rev Stat Ann tit 19, § 167 (1964), Md Cts & Jud Proc Code Ann § 5 301(a) (1980), Mich Comp Laws Ann. § 600 2901 (1968), Minn Stat § 553 02 (1982), Mont Code Ann § 27 1 601 (1981), Nev Rev Stat § 41 380 (1979), Or Rev Stat § 30 840 (1981), Va Code § 8 01 220 (1950), W Va Code § 56 3 2A (Supp 1983), Wis Stat Ann § 768 01 (West 1980), Wyo Stat Ann § 1-23 101 (1977)

4. *Fundermann v Mickelson*, Iowa, 304 N W 2d 790 (1981), *Wyman v. Wallace*, 94 Wash 2d 99, 105, 615 P 2d 452, 455 (1980).

5. Ala Code § 6 5 331 (1975) (injunction permitted, *see Logan v Davidson*, 282 Ala 327, 330, 211 So 2d 461, 463 (1968)), Fla Stat. § 771 01 (1981); N J Stat Ann § 2A 23-1 (West 1952), N Y Civ Rights Law § 80-a (McKinney 1976), Ohio Rev Code Ann § 2305 29 (Page 1981), Vt Stat Ann. tit. 15, § 1001 (Supp 1983)

6. Okla Stat Ann tit 76, § 8 1 (West Supp 1982-1983) (action permitted only if spouse was incompetent or minor at time of alleged alienation), Pa Stat A in tit 48, § 170 (Purdon 1965) (action permitted if defendant is blood relative of plaintiff)

states have voiced their dissatisfaction with the cause of action,[7] and three others have enacted legislation shortening their statutes of limitation to one year.[8] Louisiana has never recognized this cause of action.[9] We note that with but two exceptions, when this cause of action has been abolished it has been by legislative rather than judicial action.

[6] Defendant argues that a cause of action for alienation of affections is based on the obsolete and fictitious assumptions that "the wife is one of the husband's chattels, and that her companionship, her services and her affections are his property." *Moulin v. Monteleone*, 165 La. 169, 175, 115 So. 447, 450 (1927). While the archaic notion of "wife as chattel" may have served as the historical foundation for this cause of action, its modern content bears little resemblance to that notion. The right to recover for alienation of affections now extends to both spouses equally. *See, e.g., Heist v. Heist*, 46 N.C.App. 521, 265 S E.2d 434 (1980); *Burch v. Goodson*, 85 Kan. 86, 116 P. 216 (1911). Moreover, an action for alienation of affections is no longer based on the premise that either spouse constitutes the "property" of the other, but on the premise that each spouse has a valuable interest in the marriage *relationship*, including its intimacy, companionship, support, duties, and affection. Note, "The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship," 48 *Notre Dame Law.* 426, 430–31 (1972).

7. *Ferriter v Daniel O'Connell's Sons, Inc*, 381 Mass 507, 1980 Mass Adv Sh 2075, 413 N E.2d 690, 694 (1980) (action disfavored), *Dube v Rochette*, 110 N H 129, 130, 262 A 2d 288, 289 (1970) (susceptible to abuse but legislative judgment to allow action respected), *Thompson v Chapman*, 93 N M 356, 358, 600 P 2d 302, 304 (N M Ct App 1979) (court would abolish tort if it had authority to do so)

8. Ark Stat Ann § 37 201 (Supp 1983), Ky Rev Stat § 413.140(1)(c) (Supp 1982) (includes alienation action, *see Skaggs v Stanton*, Ky.Ct. App., 532 S W.2d 442, 443 (1975)); R.I Gen Laws § 9-1-14 (Supp 1982).

The law protects many relational interests. L. Green, "Basic Concepts: Persons, Property, Relations" in *The Litigation Process in Tort Law* 413, 418-24 (1965). We have recently recognized a plaintiff's right to recover for the loss of prospective economic relations. *Leigh Furniture & Carpet Co. v. Isom*, Utah, 657 P.2d 293 (1982). We recognize a cause of action against a defendant who intentionally interferes with a contractual relation. *Bunnell v. Bills*, 13 Utah 2d 83, 90, 368 P.2d 597, 602 (1962) (inducing breach); *Restatement (Second) of Torts* § 766 (1977). Our wrongful death statutes have long recognized the value of a plaintiff's interest in his or her relationships with family members. U C.A., 1953, §§ 78-11-6, 78-11-7. We have repeatedly sustained a plaintiff's right to recover for "the loss of society, love, companionship, protection and affection which usually constitute the heart of the action" *Jones v. Carvell*, Utah, 641 P.2d 105, 108 (1982). *Accord, In re Behm's Estate*, 117 Utah 151, 159-60, 213 P.2d 657, 661 (1950).[10] The marital relationship is entitled to as much protection as these.

[7] Second, defendant contends that there is no proof that an action for alienation of affections achieves its intended purpose of protecting and preserving the marriage. In contrast, he argues, "the very nature of the action serves as a destructive influence on the marriage." This argument misperceives the purpose of the action. It makes little sense to speak of actions growing out of injuries to relations as intended to "preserve" or "protect" those relations.

9. *Moulin v Monteleone*, 165 La 169, 115 So 447 (1927), *Ohlhausen v Brown*, La Ct App., 372 So 2d 787, 788 (1979).

10. The value of affection in such familial relationships was even recognized implicitly by a court that abolished a cause of action for alienation of affections between spouses Despite its strident language on the abolition, the court expressly retained a cause of action for alienating the affections of a child *Wyman v Wallace*, 15 Wash App 395, 400 & n 4, 549 P 2d 71, 74 & n 4 (1976), *aff'd*, 94 Wash 2d 99, 615 P 2d 452 (1980) (after initially reversing in 91 Wash 2d 317, 588 P.2d 1133 (1979))

Actions for intentional interference with prospective economic relations or for inducing breaches of contract are not intended to reestablish those relations or reinstate those contracts but to compensate plaintiffs for their loss. Actions for wrongful death obviously do not restore the plaintiffs' relationships with the deceased; the law seeks only to compensate for losses. Similarly, a suit for alienation of affections does not attempt to "preserve" or "protect" a marriage from interference, but only to compensate a spouse who has suffered loss and injury to his or her marital relationship through the intentional interference of a third party.

Third, defendant contends that the threat of an action for alienation of affections is a powerful tool of extortion since "there exists such potential to damage reputations" that at least one court and one commentator have characterized alienation actions as "legalized blackmail" *Wyman v. Wallace*, 15 Wash.App 395, 397, 549 P.2d 71, 72 (1976), *aff'd*, 94 Wash.2d 99, 615 P.2d 452 (1980); M. Grossman, *The New York Law of Domestic Relations* § 313 (1947). While it cannot be gainsaid that many types of litigation place private facts in a public light, an action for alienation of affections is no more "extortive" in this sense than an action for criminal conversation, which has adultery as its operative element, *Cahoon v. Pelton*, 9 Utah 2d 224, 231, 342 P.2d 94, 98–99 (1959), or a suit to change the custody of children on the basis of the parental deficiencies of the custodian, or a defamation action in which the defense of truth puts the plaintiff's reputation in question. *See, e.g., Crellin v. Thomas*, 122 Utah 122, 247 P.2d 264 (1952). If, as defendant claims, it is "[g]reed, revenge, spite and a desire to humiliate others" that encourages a plaintiff to sue for alienation of affections, the plaintiff must surely be dissuaded to some extent by the knowledge that his or her own foibles, failures, and inadequacies as a marital partner may be given public exposure by a defendant seeking to disprove causation or to mitigate damages.

[8] In any case, even if some alienation actions are motivated primarily by spite or extortion, that is no basis on which to abolish the cause of action altogether.

> First, the very purpose of courts is to separate the just from the unjust causes; second, if the courts are to be closed against actions for .. alienation of affections on the ground that some suits may be brought in bad faith, the same reason would close the door against litigants in all kinds of suits, for in every kind of litigation some suits are brought in bad faith; the very purpose of courts is to defeat unjust prosecutions and to secure the rights of parties in just prosecutions . . .

Wilder v. Reno, 43 F.Supp. 727, 729 (D.Pa. 1942). It is noteworthy that our research has disclosed only one case in which there was evidence that the plaintiff and the "alienated" spouse colluded for purposes of extortion, and in that case recovery was denied. *Wilson v. Aylward*, 207 Kan. 254, 484 P.2d 1003 (1971).

In truth, "procedural limitations and judicial discretion have been deemed adequate safeguards against abuse in other areas of the law vulnerable to bogus claims," and "[t]here is no reason to assume that they cannot be used to similar advantage in this area." Note, 48 *Notre Dame Law., supra*, at 430. Moreover, the courts will not tolerate waste or abuse of judicial resources, and a plaintiff who institutes a groundless or collusive suit is subject to a suit or counterclaim for abuse of process or malicious prosecution. *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d at 308–09; W. Prosser, *Handbook of the Law of Torts* §§ 120, 121 (4th ed. 1971). Finally, abolishing a cause of action for alienation of affections will not eliminate or even reduce extortion (which can still be accomplished by threatening to expose a person to his family or colleagues or publicize his indiscretions in other ways), but it will surely close the courthouse doors to at least some deserving plaintiffs.

[9] Defendant's contention that an action for alienation can be used to victimize

innocent and unsuspecting defendants is answered by the fact that this is an intentional tort. There can be no recovery against a defendant whose conduct is blameless or merely negligent (such as a person who is not aware that the object of his or her attentions is married). On the other hand, the element of intent can be proved where the defendant's actions are the product of choice. *See* Note, 48 *Notre Dame Law., supra*, at 431. In fact, where a defendant has actual notice of the marriage, his or her continued overtures or sexual liaisons can be construed as something akin to assumption of the risk that this conduct will injure the marriage and give rise to an action.

[10] Fourth, relying on *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), defendant contends that "an alienation of affections action unreasonably, and perhaps unconstitutionally, interferes with and impinges upon [a] defendant's right of privacy ... in the area of personal and sexual relationships between individuals." This argument is misplaced for two reasons. *Griswold* and *Eisenstadt* are inapposite because sexual relations are not a necessary element of alienation of affections. *Cahoon v. Pelton*, 9 Utah 2d at 231, 342 P.2d at 98–99; *Trainor v. Deters*, 22 Ohio App.2d 135, 139–40, 259 N.E.2d 131, 135 (1969). Second, while both *Griswold* and *Eisenstadt* were said to involve "unwarranted *governmental* intrusion" into sexual relations and reproductive choices, *Eisenstadt*, 405 U.S. at 453, 92 S.Ct. at 1038 (emphasis added), a cause of action for alienation of affections involves interference by a *private individual*. As between two private individuals, defendant's claim to sexual and reproductive privacy can be no greater than plaintiff's, and neither can claim constitutional immunity to use his or her own "rights" to invade the "privacy" of the other.

Fifth, defendant urges us to abolish all actions for alienation because it is difficult to determine the intangible injuries involved. Since there is no standard of measurement for the trier of fact, defendant argues, judgments in this area of the law are frequently arbitrary and excessive. But the injury in this action seems no more "intangible" and no more difficult to value than pain and suffering in a personal injury action or the loss of comfort, society, and companionship in an action for wrongful death. The emerging law of intentional infliction of emotional distress attests to the law's willingness to have juries and judges put monetary values on psychic and emotional harm. *See, e.g., State Rubbish Collectors Association v. Siliznoff*, 38 Cal.2d 330, 337–39, 240 P.2d 282, 286 (1952) (en banc) (Traynor, J.).

[11, 12] It would be anomalous and unjust to deny recovery where the *fact* of injury or loss can be proved simply because there is difficulty in assessing its *amount*. *Cf. Cook Associates, Inc. v. Warnick*, Utah, 664 P.2d 1161, 1165–66 (1983) (lost profits from new business venture). In *Jones v. Carvell*, Utah, 641 P.2d 105 (1982), we discussed the application of this principle to the recovery of damages for wrongful death, concluding as follows:

> To be sure, the making of such judgments is not easy and requires great understanding of those human values which can make interpersonal relationships so precious. Yet, the process, difficult as it is, must be tempered and confined so as to strike a just balance. The process is not unique to wrongful death cases.

Id. at 108. The rule that affirms the availability of a cause of action despite uncertainties in the assessment of damages is of course implemented in the context of appropriate jury instructions and the court's power to require remittitur to restrain or reduce arbitrary or excessive jury verdicts. Utah R.Civ.P. 59(a)(5); *Cahoon v. Pelton*, 9 Utah 2d at 227, 342 P.2d at 95; *Ruf v. Association for World Travel Exchange*, 10 Utah 2d 249, 351 P.2d 623 (1960); *Tice v. Mandel*, N.D., 76 N.W.2d 124 (1956).

Defendant's final argument is both more subtle and more persuasive. He contends that the only marriages which are vulnerable to the depradations of a third party are those in which there is already discord from

other causes He cites the difficulty of proving causation in actions for alienation of affections He then concludes that where the alienation is attributable to any significant degree to the plaintiff's own conduct or to the conduct of the alienated spouse, it would be unjust to permit the recovery of damages from a third party

[13] While conceding the difficulty of proving causation, we conclude that it would be unjust to refuse to try to measure the effect of a third party's intrusion in a marriage just because the parties to the marriage share some of the responsibility for its demise Even relatively "good" marriages have intermittent difficulties upon which a predatory defendant might capitalize And even where spouses are estranged, there is merit to the argument that "each has a right to seek a rapprochement that should be protected against those who would cut it off" Note, 48 *Notre Dame Law , supra,* at 432 We are unwilling to adopt a rule of law that would foreclose all remedies on the questionable assumption that any plaintiff whose marriage has gone aground "must have deserved it" We prefer to consider the state of the marriage and the actions of both spouses as relating to causation and damages

[14] We outlined such an approach in the leading case of *Wilson v Oldroyd,* 1 Utah 2d 362, 267 P 2d 759 (1954) There, in discussing the element of causation, we stated

> If the acts or conduct of the plaintiff himself, or any other cause than the acts of the defendant constituted the *controlling cause* of plaintiff's loss of affections, then he could not recover, and the same would be true "if the plaintiff's wife fell in love with defendant without any affirmative inducement or encouragement from the defendant " [Emphasis added]

[1] Kansas and Hawaii have gone even further Building on a well developed body of case law in the area of alienation Long v Fischer 210 Kan 21 25 26 499 P 2d 1063, 1067 (1972) redefined the element of causation to make it practically impossible for a plaintiff to sustain the necessary burden of proof This Kansas rule was adopted verbatim in *Hunt v Chang* 60 Hawaii 608 594 P 2d 118 (1979)

Id at 374, 267 P 2d at 768 On the issue of damages, we stated "It is true that there may be great or little affection and that the damages should be proportionate to that which is taken away from the [injured spouse]" *Id*

In an apparent effort to improve the fairness of this cause of action, recent cases in other jurisdictions have raised the plaintiff's burden of proof on the issue of causation and redefined the factors bearing on damages For example, *Heist v Heist,* 46 N C App 521, 265 S E 2d 434 (1980), which affirmed the plaintiff wife's recovery for alienation of affections, specifies the following considerations as bearing on those issues

> In order to sustain a cause of action for alienation of affections, the plaintiff must show the following facts
>
> (1) that she and her husband were happily married and that a genuine love and affection existed between them,
>
> (2) that the love and affection so existing was alienated and destroyed,
>
> (3) that the wrongful and malicious acts of defendant produced and brought about the loss and alienation of such love and affection
>
> The wrongful and malicious conduct of the defendant need not be the sole cause of the alienation of affections It suffices, according to the rule in a large majority of the cases, if the wrongful and malicious conduct of the defendant is *the controlling or effective cause of the alienation,* even though there were other causes, which might have contributed to the alienation [Citations omitted, emphasis added]

46 N C App at 523, 265 S E 2d at 436 *Accord, Thompson v Chapman,* 93 N M 356, 357 58, 600 P 2d 302, 303-04 (N M Ct App), *cert denied,* 92 N M 675, 593 P 2d 1078 (1979) [1]

[15, 16] After considering the various definitions enunciated in other states since our decision in *Wilson v Oldroyd,* we are content to reaffirm the rules we established in that case, subject to the two following clarifications and elaborations

First, the requirement that the defendant's acts must have constituted the "controlling cause" of the alienation of affections means that the causal effect of the defendant's conduct must have outweighed the combined effect of all other causes, including the conduct of the plaintiff spouse and the alienated spouse For this purpose, a defendant is properly chargeable with the effect of mere acquiescence in the overtures of the alienated spouse where the defendant knows or has reason to know that such acquiescence will damage the marital relationship

[17] Second, in trying to make the damages "proportionate" to the loss of the injured spouse, the trier of fact should consider the duration and quality of the marriage relation, including the extent to which genuine feelings of love and affection existed between the spouses prior to the intervention of the defendant

III PUNITIVE DAMAGES

For the further guidance of the district court on remand, we add two rulings on the law of punitive damages as applied to this case and this cause of action

[18-19] First, punitive damages can be recovered for the tort of alienation of affections *Wilson v Oldroyd,* 1 Utah 2d at 370, 267 P 2d at 765 As a general rule, punitive damages are available where the defendant's conduct was "wilful and malicious" *Kesler v Rogers,* Utah, 542 P 2d 354, 359 (1975) However, our commitment to "caution" in the application of punitive damages, *First Security Bank of Utah v J B J Feedyards, Inc,* Utah, 653 P 2d 591, 598 (1982), and the fact that the elements of willfulness and maliciousness are, in effect part of the cause of action for alienation of affections,[2] persuade us to require something more with respect to this tort To avoid a circumstance in which punitive damages are automatically available in every such cause of action, we hold that in order to recover punitive damages for the tort of alienation of affections the plaintiff must show "circumstances of aggravation in addition to the malice implied by law from the conduct of defendant in causing the separation of plaintiff and [his or her spouse] which was necessary to sustain a recovery of compensatory damages" *Heist v Heist,* 46 N C App at 527, 265 S E 2d at 438, 41 Am Jur 2d *Husband and Wife* § 485 (1968)

[20, 21] Second, the award of $25,000 in punitive damages in this case could not be sustained in any event because it was entered without adducing any evidence or making any findings of fact regarding defendant's net worth or income While an award of punitive damages requires consideration of many factors, it is primarily intended to punish the defendant and thereby deter others similarly situated from imitating his conduct *Leigh Furniture & Carpet Co v Isom,* 657 P 2d at 312, *First Security Bank of Utah v J B J Feedyards, Inc,* 653 P 2d at 598 99 Thus, the defendant's net worth and income are always relevant in determining the amount of punitive damages that would be appropriate for punishment We have expressly held "that it is proper to receive evidence and consider the wealth of the defendant as bearing upon the issue of punitive damages" both in actions for alienation of affections, *Wilson v Oldroyd,* 1 Utah 2d at 372, 267 P 2d at 766, and criminal conversation, *Cahoon v Pelton,* 9 Utah 2d at 232, 342 P 2d at 99 To the contrary, where a trial record contained no evidence of the defendant's net worth or income, we have, on our own motion, reduced a judgment of punitive damages to

[2] The tort of alienation of affections requires proof that the defendant 'wilfully and intentionally alienated the spouse s affections *Wilson v Oldroyd* 1 Utah 2d at 367 267 P 2d at 763 and the nature of the wrong inflicted is such that malice is in effect a necessary ingredient of the tort *Birchfield v Birchfield* 29 N M 19 24 217 P 616, 619 (1923)

permit an award of no more than $6,000 *Cruz v Montoya* Utah, 660 P 2d 723, 727 (1983)

The judgment is reversed, and the case is remanded for a new trial in accordance with this opinion Costs to appellant

HOWE, J , concurs

HALL, Chief Justice (concurring and dissenting)

I concur in the opinion of the Court insofar as it retains alienation of affections as a viable cause of action in the state of Utah, and insofar as it refuses to sustain the award of punitive damages (Parts II and III) However, I dissent from that portion of the opinion which remands the case for a new trial based on the conclusion that the defendant was denied due process of law

Defendant claims that he was denied a fair trial because he was not afforded timely notice and was thus denied an opportunity to be heard in a meaningful way His contention that he did not realize until two days before the trial began that he was to be prepared for trial and not merely for a 'hearing, is simply not borne out by the record On the contrary, it is clear that his alleged lack of knowledge stems not from an absence of notice and opportunity to be heard, but from his voluntary choice not to retain a new attorney and to represent himself

On January 7 1981, the trial judge set aside the earlier order of dismissal of the complaint, reinstated the action and set the case for trial on January 21, 1981 Defendant personally appeared at that time, *without counsel*, and heard the date being set Defendant claims that he was misled by the use of the word "hearing" rather than "trial" and therefore was not given actual notice that he must face trial on January 21 This is a specious argument Defendant's brief acknowledges that had defendant had an attorney representing him, the attorney would have understood that he was facing a trial and not merely a hearing Therefore, the resolution of this question hinges not on what defendant did know, but on what he should have known

Article I, § 11 of the Utah Constitution and U C A , 1953, § 78 51 25 guarantee a party to a civil action the right to represent himself[1] However, as the main opinion points out, the general rule is that a party appearing pro se is held to the same standards of knowledge, rules and procedures as would be a qualified attorney[2] In fact, if a litigant, *for whatever reason*, sees fit to rely on himself as counsel, he must be prepared to accept the consequences of his mistakes and errors[3]

Defendant voluntarily chose to appear at the January 7 hearing without an attorney, he did not question the judge as to exactly what would happen on January 21, as was his right and his duty if he was going to represent himself, and he did not thereafter consult an attorney as to the proper steps to be taken He merely showed up at trial on January 21 and acknowledged that he intended to represent himself

That the defendant had made the decision to represent himself in the trial before the court and that he was prepared to proceed without a continuance are clearly reflected in the record

THE COURT Mr Jacobsen?

MR JACOBSEN Yes, Your Honor

THE COURT Are you represented by an attorney, Mr Jacobsen?

MR JACOBSEN No, Your Honor I'd like to offer a brief explanation of my apology for that I was unable to acquire legal counsel because of financial difficulties, so I spoke to Mr Brown, the Prosecuting Attorney of Sanpete County, and he went over everything with me and advised me that because of my financial

1 *See also Heathman v Hatch* 13 Utah 2d 266 268 372 P 2d 990 991 (1962)

2 *See e g Manka v Martin* 200 Colo 260 614 P 2d 875 880 (1980) (en banc) *Malin v Liddle* 102 Idaho 705 639 P 2d 3 4 (1981) *Johnson v Aetna Casualty & Surety Co of Hartford* Wyo 630 P 2d 514 517 (1981)

3 *Manka v Martin* supra n 2 at 880

situation, I'd better defend myself, so I'm prepared to do that

THE COURT You understand, of course, that it's the Court's obligation to hear the evidence and make a ruling based upon the evidence and be fair to both parties under the law, do you understand that?

MR JACOBSEN Yes, I do, Your Honor I hope you'll bear with me in the fact that I'm not versed in any Court procedures or anything like that but—

THE COURT You have a right to represent yourself and likewise I have to rule and make certain rulings that you might not understand

MR JACOBSEN I understand The terminology and everything will probably be—

THE COURT Alright, are you prepared to go forward, Mr Jacobsen?

MR JACOBSEN Yes, I am

At this point, it would have been but a simple matter for defendant to protest to the trial judge that he needed more time to prepare or to retain a new attorney, that his files and depositions were still in the possession of his former attorney and thus not available to him in preparation of his defense, or that he wanted a jury trial Had he but raised any of these questions to the trial court, we might have a different case here

But he did not raise these questions and went forward with the trial In so doing, he accepted the consequences of that action, ignorance of the law notwithstanding

The main opinion points out that this Court has said that a layperson acting as his own attorney "should be accorded every consideration that may reasonably be indulged"[4] The record shows that the trial judge did make every effort to accommodate defendant's lack of legal knowledge during the trial Preceding the trial, the judge carefully explained the procedures to be followed during the trial As the trial went on, he further explained procedures, the bases for objections and the way to cure those objections The judge also raised objections himself when plaintiff's counsel was pursuing an improper line of questioning And finally, he occasionally overruled objections of plaintiff's counsel, explaining

THE COURT I know but he isn't a lawyer so I've got to be liberal with him, Mr McIff, so your objection's overruled I realize it's not proper but I feel like I've got to give latitude

The main opinion, however, suggests that this is not enough and requires the trial court to caution the pro se litigant as to the risks of representing himself and to apprise the litigant of his available legal options

Heretofore there has been no requirement, in either the federal courts or the state courts, that a party appearing pro se in a civil trial must be cautioned as to the dangers and disadvantages of self representation, nor must he be given a laundry list of all of his available legal options While it is true that this caution must be given to pro se defendants in criminal trials,[5] the standard in civil trials is not nearly so stringent In fact, the federal courts have held that there is no constitutional right to counsel at all in civil trials[6]

Thus, the main opinion imposes an entirely new and rigid procedure on trial judges who are faced with pro se litigants I believe that this stricture is neither necessary nor proper in civil trials

The instant case is a good case in point Having seen fit to retain counsel initially, defendant was obviously aware of the benefits to be derived from representation by counsel Conversely, he had to have been aware of the hazards of going it alone Having seen fit to discharge his former counsel, for whatever reason, and to pro-

4 *Supra* n 1, 372 P 2d at 991

5 *Faretta v California* 422 U S 806 95 S Ct 2525 45 L Ed 2d 562 (1975) *State v Domínguez*, Utah, 564 P 2d 768 (1977)

6 *Boulware v Battaglia* 344 F Supp 889 *aff'd* 478 F 2d 1398 (D Del 1972) *U S ex rel Stuart v Yeager* 293 F Supp 1079 (D N J 1968) *aff'd* 419 F 2d 126 (3rd Cir 1969) *cert denied* 397 U S 1055, 90 S Ct 1400 25 L Ed 2d 673 (1970)

ceed with the trial acting as his own attorney, he cannot be heard to complain now that he was deprived of due process of law because of results directly attributable to his own actions

I believe that the trial judge exercised sound discretion in permitting the trial to go forward and that the defendant was not deprived of any constitutional protections

STEWART, Justice (concurring and dissenting)

I concur in Parts I and III of the majority opinion However, I dissent from Part II for the reason that the majority fixes the limitations of the tort of alienation of affections more broadly than I think justifiable

When defined broadly the tort of alienation of affections largely ignores the almost invariable contributing influences of both the plaintiff and the plaintiff's estranged spouse in contributing to, if not creating in the first instance, a disharmonious relationship, which sometimes results in one or both of the unhappy spouses seeking other intimate relations with another person, however unjustifiable that may be The delicate and often fragile bonds that unite a husband and wife can only flourish in an atmosphere of reciprocal tenderness Yet marriage bonds are constantly subject to innumerable tensions and threatening forces that can never be measured juristically in any realistic way The power of such forces is demonstrated in the fact that some 40% of the marriages in this country end in divorce And it is not often that full responsibility for the breakdown of a marriage can be attributed with any great degree of assurance to one or the other of the parties, let alone solely to the conduct of a third person

We do not live in a day, if ever there were one when male or female Casanovas cast a spell that all but nullifies the will power of a member of the opposite sex Persons who have been married do not generally fall prey to overwhelmingly seductive powers of another like some inert piece of iron drawn inexorably into the ever-stronger field of power of a magnet The affection of married persons for each other is usually alienated by their own conduct or misconduct

Nevertheless, the tort of alienation of affections may provide a proper remedy for certain conduct that interferes with the marital relationship Sex is a powerful force There are those in special positions of power, status, or authority who may illicitly use sex to satisfy their own passions or for otherwise improper ends There are any number of such relationships, i e, professors and students, physicians and patients, psychiatrists, psychoanalysts, or psychologists and clients, and employers and employees Those who use positions of power or authority for the purpose of obtaining sexual favors and produce an alienation of affections between the one in an inferior position and his or her spouse, abuse and overreach any legitimate power *they may have In such cases, the consequence* may be not only the breakup of one or perhaps two marriages, but also unforeseeable consequences in the future lives of the children from such marriages

In other cases, where there is no abuse of power or authority, I think the tort of alienation of affections will cause much more harm than any good it may do The judicial invitation to often vindictive persons, who usually have not perceived the mote in their own eyes, to use the courts to lash back at paramours of their spouses, sometimes simply as a means of blackmail, will provide little protection to the marriage relationship, and never be a force for reestablishing that relationship The ugliness of the inevitable disputes over fault in divorce cases will only be magnified in most alienation of affection cases and will not be offset by any countervailing good I see little reason to promote such unseemly disputes when so little is likely to be gained, except in those types of cases where one person abuses his or her power or authority

DURHAM, Justice (concurring in result and dissenting)

I join in the reversal of this judgment, but dissent from Part II of the majority

opinion because I believe that the cause of action for alienation of affections should be abolished It is an anachronistic holdover from a bygone era which modern rationalizations have failed to justify The majority opinion identifies and addresses in turn six arguments presented by the appellant for abolition of the cause of action Although the majority opinion rejects each of the appellant's arguments separately, it fails to set forth any affirmative reasons in policy or precedent for the retention of this cause of action in Utah The majority opinion goes on to make the requirements for recovery so difficult that it is unlikely anyone will ever pursue this cause of action in court again By this approach, I believe the majority acknowledges that the cause of action is defective in its weak theoretical basis and the numerous opportunities it offers for abuse However instead of eliminating the cause of action in a forthright manner, the majority opinion preserves the cause of action in a way that insures that its most likely use will be *outside* of the courtroom, as a tool to extort "settlements" from prospective defendants The cause of action for alienation of affections should be abolished because there is no longer any legal basis for its retention It protects no interest and furthers no policy not better served by other means A brief review of the history of alienation of affections reveals why this is so

In the early days of the common law, marriages were entered into for economic, diplomatic or dynastic reasons and were, indeed, bargains with specific terms set by the families of the bride and groom *See, e g*, Schultz, "Contractual Ordering of Marriage A New Model for State Policy," 70 Cal L Rev 211, 224 25 (1982) Consideration was offered by each party the groom agreed to protect and support the bride and her children, and the bride agreed to bear heirs for the groom, educate them and administer the household Individual marriage contracts and the rights of marriage were valuable incidents in feudal tenure both economically and militarily *See, e g*, 3 Holdsworth, *History of English Law*, 61 (3d ed 1923) In addition, the identification of legitimate offspring was of crucial importance to inheritance laws *See, e g*, Lippman, "The Breakdown of Consortium," 30 Colum L Rev 651, 655 (1930), Comment, "Piracy on the Matrimonial High Seas—The Law and the Marital Interloper," 25 Sw L J 594 (1971)

However, although the marriage relationship "was founded on contract [in the middle ages], the rights and duties involved in the relationship were fixed to a large extent by law and not by the agreement of the parties, and the consequences of creating the relationship might affect third persons " 2 Holdsworth, *supra*, at 463 The marriage created a new *status* for each of the parties The importance of status in medieval society can scarcely be overemphasized

> That there were different classes of society which should be governed by different laws would have appeared a truism to the mediaeval legislature The king, the peer, the knight all occupied definite and legally fixed places in the hierarchy of society [I]n the Middle Ages the difference in legal rules was conceived of as depending upon the necessary and natural differences in the structure of society

Id at 464 Individuality, as we now value that concept, would have been regarded as akin to anarchy, placing a person outside of the benefits and protection of the law and denying him or her a position from which to interact with society As far as the law was concerned, a person's status and a person's identity were the same individual characteristics were irrelevant

A wife in this system occupied a particular status as a female and as a married person Bracton described three categories of human beings "There is also another division of human beings, that some are male and other female, and others hermaphrodites And females differ from males in many respects, because their condition is worse than that of males" 1 Bracton, *Laws and Customs of England* * 35 (Twiss ed 1879) Thus, as a female, the wife was considered her husband's inferior by her

nature Canon law imposed the view that a husband and wife were one flesh and one person in the law and that the person was the husband Therefore, during coverture, even the woman's separate status as an inferior female was subsumed in the conjugal unit In this setting, a cause of action for the abduction of the wife, the ancestor of the cause of action for alienation of affections, recognized a challenge to the status of both husband and wife and vindicated real damage to contractual and feudal rights Because of the wife's legal disability, her actual consent or lack of consent was not considered The action was brought by the husband against the third party, regardless of the issue of the wife's consent Under the feudal system, society at large had an economic, military and political interest in the enforcement of the marriage contract and the status of the married parties

In the feudal era because of the interconnections between interests in property and virtually all other aspects of society, "the law of property, and the remedies for the infringement of proprietary rights, were then much more highly developed than the law of contract, and the remedies for breach of contract" 8 Holdsworth, *supra*, at 427 The "law of crime and tort was narrow" and "permeated by the idea of trespass—by the idea, that is, of forcible damage to person or property" *Id* at 421 In this era, taking into consideration the emphasis and development in the law, the highly structured nature of society, the accepted concept of the conjugal unit, and the inferior status of women, it is understandable that the husband's interest in his wife and their relationship was expressed as a proprietary interest and that it therefore supported an action in trespass against a third party

Although the "bargained-for" contractual aspects of marriage declined and the Renaissance concept of individuality eventually replaced the feudal concept of societal status, the common law forms of pleading preserved the husband's action for damage to his marital rights as an action in trespass The husband was said to have the exclusive and legally enforceable right to his wife's services and company The action was brought in trespass by the husband with a "*per quod consortium amisit*," i e, 'whereby he lost the company [of his wife]," and was for "the loss and damage of the husband" not for damage suffered by the wife or the conjugal unit *See Hyde v Scyssor*, 79 Eng Rep 462 (1620) The action was likened to the action "brought by the master for the battery of his servant, *per quod servitium amisit*," i e, "whereby he lost the service [of his servant]" *Id* By Blackstone's time, the husband's legal rights with respect to his wife were described by the term "consortium" and included her society and services *See* Feinsinger, "Legislative Attack on 'Heart Balm,'" 33 Mich L Rev 979, 989 (1935) The husband had a cause of action for an intentional interference with those rights Under the title Injuries Affecting a Husband," Blackstone described abduction of the wife as follows "[A]bduction or taking her away may either be by fraud and persuasion, or open violence though the law in both cases supposes force and constraint, *the wife having no power to consent* " 3 Blackstone, *Commentaries* *139 (1768) (emphasis added) This action was exclusively the husband's to compensate him for *his* injuries The wife had no similar cause of action, as traditionally she had no right to her husband's "services" but rather a right to his protection and support—unenforceable because of her legal disability This disability was not viewed as an injustice in mid eighteenth century England Blackstone commented that "we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit So great a favorite is the female sex of the laws of England" *See* 1 Blackstone, *supra*, at *445 Thus, the proprietary cause of action originally reflected widely accepted views of status and legal rights in a society where contractual and legal obligations incident to marriages were part of a system of political, military and property obligations The remedy provided by the law for violation of those rights and obligations addressed injury to the society's interest in those obligations Moral infractions were separate matters left to the ecclesiastical courts This cause of action for abduction gradually evolved into a personal tort action vindicating the husband's legal, not contractual, rights to his wife's services and society, called consortium Parallel to this evolution, it may be seen that the rationale for the procedural disability of the married woman had broadened from the canonical "one flesh" to include the Blackstonian "protection and benefit" rationale

The more modern form of the action for abduction appeared in England in 1745 when the court recognized a husband's right to recover for the "enticement" of his wife away from their home *See Winsmore v Greenbank*, Willes 577, 125 Eng Rep 1330 (1745) In the United States, the common law action for abduction or enticement of the wife was adopted in every state but Louisiana *See* Feinsinger, *supra*, 33 Mich L Rev at 992 and n 17, Note, "The Suit of Alienation of Affections Can Its Existence Be Justified Today?" 56 N D L Rev 239, 241 (1980) The definition of consortium, originally the husband's right to his wife's services and company, was gradually broadened to include love, affection and in general, good relationships in the family For example, in *Jacobson v Siddal*, 12 Or 280, 7 P 108 (1885), the court declared that "[t]he injury done the husband consists in the dishonor of his marriage bed, the loss of his wife's affection, and the comfort of her society, as *well as any pecuniary injury for loss of services*" *Id* at 285, 7 P at 111 (emphasis added)

The growing unpopularity of the husband's proprietary rights in his wife's services was probably accelerated by the advent of the Married Women's Acts in the latter half of the nineteenth century, which removed the married woman's inability to sue and be sued *See, e g*, Comment, *supra*, 25 Sw L J at 596–97 Courts were forced to re-examine the basis for the cause of action in order to decide whether the husband's cause of action was now extinguished, or whether the cause of action could be extended to wives The resulting discussions are notable for their variety "While agreeing that the action was based primarily on loss of consortium, courts have defined the consequences variously as an injury to property, to the person, to personal rights, or to feelings" Feinsinger, *supra*, 33 Mich L Rev at 993 Some courts found that the wife had no right to sue for criminal conversation or alienation of affections In *Kroessin v Keller*, 60 Minn 372, 62 N W 438 (1895), the Minnesota court refused to find a wife's right to bring an action for criminal conversation, stating that the gist of the action was the possibility of illegitimate children and pointing out that 'the wife whose husband commits adultery suffers no 'disgrace' and that in any event a woman [defendant] charged with adultery in all probability was not the seducer' *Id* at 991 In *Duffies v Duffies*, 76 Wis 374, 45 N W 522 (1890), the Wisconsin court refused to find an action for alienation of a husband's affections The court explained that such a cause of action would lead to a multitude of actions because a husband may be expected to yield to worldly temptations to which he is daily exposed, whereas a wife, with her purer nature, is occupied at home and not subject to such enticements *Id* at 993 *See also* Prosser, *Law of Torts* § 124, at 881 (4th ed 1971)

The great majority of the states, however, sustained the right of the wife to maintain an action for criminal conversation and alienation of affections *See, e g*, Feinsinger *supra*, 33 Mich L Rev at 993 In order to do this, courts were forced to define consortium to include more than the husband's well established right to services, and to declare that the wife now had an equal right to consortium *See, e g Oppenheim v Kridel*, 236 N Y 156, 140 N E 227 (1923) Many opinions, finding the proprietary interest distasteful, denied the clear historical basis of the husband's action in trespass, holding that the wife had an equal right to maintain the action because the enabling statutes removed the only barrier to her action, i e, her legal disability to sue or be sued *See, e g, Clow v Chapman*, 125

Mo 101, 28 S W 328 (1894) The wife's legal disability was *not*, of course, the only reason she had possessed no cause of action in the common law In the common law, she had no legally recognized right to her husband s services the basis for the action was the injury to the *husband's* legal right to his *wife's* services Ironically, it is this very proprietary interest, rejected by the courts as "archaic," which was granted to the wife

> By force of the marriage contract, husband and wife are each entitled to the society and comfort of the other,—the one to as great an extent as the other As a wife is now placed on an equality with her husband in respect of her property and personal rights, and as a husband may have his action, as against a third person, for enticing away his wife, the wife has her action against third persons for enticing away her husband

Id at 107, 28 S W at 330 Thus, while the courts of the era criticized the idea of a proprietary interest in the wife, the decisions gave the concept new life by granting to the wife the same proprietary right to sue for the loss of consortium *See* Lippman, *supra*, 30 Colum L Rev at 664

In spite of the broadened definitions of consortium, it is clear that the term continued to denote a property interest In *Tinker v Colwell*, 193 U S 473, 24 S Ct 505, 48 L Ed 754 (1904) the United States Supreme Court addressed the question of whether a judgment for criminal conversation against the appellant had been discharged in bankruptcy Under the bankruptcy act, a judgment could be discharged unless it had been recovered in an action "for wilful and malicious injuries to the person or property of another" The appellant argued that the judgment had been discharged because criminal conversation was not an injury to the respondent's "person" and that the gravamen of the action was loss of consortium, not injury to the property of the respondent The Court held

> We think it is made clear by these references to a few of the many cases on this subject that the cause of action by the husband is based upon the idea that the act of the defendant is a violation of the marital rights of the husband in the person of his wife, to the exclusion of all others, and so the act of the defendant is an injury *to the person and also to the property rights of the husband*

Id at 485, 24 S Ct at 508 (emphasis added) The same result was reached on the same question by the Kansas Supreme Court, where the judgment for alienation of affections was obtained by a wife *See Leicester v Hoadley*, 66 Kan 172, 71 P 318 (1903) In *Sullivan v Valiquette*, 66 Colo 170, 180 P 91 (1919), the Colorado Supreme Court recognized "the right of the plaintiff to the body of his wife, and to her mind, unpolluted" *Id* at 172, 180 P at 91 In a suit brought by a wife against her father-in law, the Connecticut Supreme Court declared that the "gist" of the action was loss of consortium described by the court as "a property right growing out of the marriage relation " *Hudima v Hudyma*, 131 Conn 281, 283 84, 39 A 2d 890, 891 (1944)

Another irony in the cases of this era lies in the fact that although the wife's legal disabilities were statutorily removed, the law continued to treat the wife as incapable of initiating or consenting to her own change of affections or seduction

> For the purpose of maintaining the action, it is regarded as an actual trespass upon the marital rights of the husband although the consequent injury is really to the husband on account of the corruption of the body and mind of the wife, and it is in this view (that it is a trespass upon the rights of the husband) that it is held that the *consent of the wife makes no difference, that she is incapable of giving a consent to an injury to the husband*

Tinker v Colwell, supra, 193 U S at 483, 24 S Ct at 507 (citation omitted) (emphasis added) Thus, the alienated wife's active participation in a relationship with the defendant is considered to be irrelevant in most cases The defendant bears the entire burden of having alienated the wife's affections, even where the facts reveal her willing, if not eager, cooperation *Wilson v Oldroyd*, 1 Utah 2d 362, 267 P 2d 759 (1954), cited by the majority opinion as Utah's leading case, and the instant case both illustrate this judicial tendency to ignore the wife's volitional capacity

The de facto retention of the assumption that a wife is unable to consent to an injury to her husband is an anomaly not present in those cases where the wife is the plaintiff To the contrary, in actions brought by wives, it was commonly held that it was a good defense to show that the alienated husband was the enticer and that the defendant had merely yielded to his "seductive arts" *Romaine v Decker*, 11 App Div 20, 43 N Y S 79 (1896) "The law imputes to [the defendant] no fault because of her attractiveness, nor because she may have been pleased with the admiration of plaintiff's husband" *Whitman v Egbert*, 27 App Div 374, 50 N Y S 3 (1898) In a peculiar Vermont case, the court commented that a wife could have no recovery against a prostitute for alienating the affections of her husband "A single instance of adultery, had by a man accustomed to marital infidelities, with a common prostitute, who serves his purpose on a chance occasion, does not constitute the enticement and alienation essential to a recovery" *Nieberg v Cohen*, 88 Vt 281, 287, 92 A 214, 217 (1914) Thus, when the defendant was a woman, she was frequently excused from liability by reason of a remnant of the old procedural disability in the form of judicial stereotyping which viewed men as aggressive and women as passive

During the 1930s, there was widespread discussion regarding the so called "heart balm" actions, which included breach of promise to marry, alienation of affections, seduction and criminal conversation The abolition of these actions became a "cause celebre" in many states As noted in the majority opinion, a majority of jurisdictions has eliminated the actions by statute or judicial decision It was widely felt that such suits served no constructive purpose and, in fact, were vehicles for blackmail, extortion or coerced marriages Although the majority opinion finds it "noteworthy" that research uncovers only one case in which there was evidence of collusion and extortion, one would not realistically expect reported cases to reveal this sort of abuse Frequently, the threat of filing such a suit would suffice to extract payment from a potential defendant The instant case would not be before us now if the defendant had paid the proposed $5,000 "settlement" to this plaintiff, whose wife, often beaten and abused, left him by her own free will and choice It is no answer to claim that groundless or collusive suits may be countered by actions for abuse of process or malicious prosecution Even setting aside the burden and difficulty of bringing such suits successfully, that argument suggests that there is some point in locking the barn door after the horses are out It is true, as the majority opinion points out that there are other causes of action where the parties' private lives are displayed for public view, and that this aspect of such actions alone is not a sufficient basis for their demise However, in child custody cases, the best interests of children are felt to counterbalance the sacrifice of parental privacy and dignity, and in defamation cases it is the plaintiff himself who puts his reputation on the line in order to defend it In a cause of action for alienation of affections, the plaintiff assaults the privacy and reputation of the defendant for no justiciably defendable purpose

It is for this reason that I strongly urge the abolition of the cause of action for alienation of affections this is an action without legal content, signifying nothing but the desire to wring money and revenge from the pain of a failed relationship The old common law cause of action had real content in the days when the husband had a legally recognized right to his wife's services Although we now find the concept repugnant, in the past those legal rights accurately reflected the order and concensus of society regarding the status of married persons In that society, it was logical that a court could find a third party responsible for damage to the husband's marital

rights because the wife had no legally recognized existence apart from her husband, and was generally considered more passive and persuadable by nature Those days and those rights have passed and this cause of action should be gone with them

The modern action for alienation of affections has become an action for interference with the mental and emotional attitude of one spouse toward the other *See, e g, Wyman v Wallace*, 94 Wash 2d 99, 615 P 2d 452 (1980), Prosser, *supra*, at 876 The majority opinion posits no basis in statute or common law to support such an action The argument is made that "[t]he marital relationship is entitled to no less protection than" other relational interests, referring to causes of action for loss of prospective economic relations, interference with a contractual relation and wrongful death However, this analogy fails to recognize inherent differences between the marital relationship and other types of relationships The relationship between married people does not resemble that between parties who undertake a commercial transaction based on pecuniary interests In the usual contractual setting, the times at which the contract will begin and end and expectations for performance are identified and limited by the parties themselves If the parties have dealt at arm's length, and there have been consideration and a meeting of minds, the law will both enforce the contract and protect its performance from third party interference Our legal system is capable of this task because the obligations and the adequacy of their performance may be ascertained with a reasonable degree of accuracy Therefore, if A is damaged in his contractual relationship with B, A has a cause of action against B if B has breached, or against C if C has wrongfully interfered with A's or B's performance, or against B *and* C if together they have damaged A *See, e g, Bunnell v Bills*, 13 Utah 2d 83 368 P 2d 597 (1962) It should be noted that if C interferes with the performance of the contract between A and B without their cooperation, *either* A or B could have a cause of action against C

The relationship between a husband and wife bears no resemblance to the contractual paradigm which is the legal basis for loss of prospective economic relations and interference with a contractual relationship Although we speak of the marriage "contract," it has been centuries since marriage has involved true contract principles in Western cultures The purposes of marriage are not pecuniary In our society, it is now widely accepted that men and women enter marriage to seek personal fulfillment and happiness *See e g*, Schultz, *supra*, 70 Cal L Rev at 250 51 Furthermore, unlike the parties to a contract, parties who wish to marry do not make their own law The state, not the parties, controls who may marry, what procedure must be followed, and how and why the marriage may be terminated In Utah, each spouse is required to support the other financially when necessary, *see* U C A , 1953, §§ 78 45 3 & 4, and neither may recover for loss of consortium when the spouse is injured by another *See* U C A , 1953, § 30 2 4, *Tjas v Proctor*, Utah, 591 P 2d 438 (1979) However, the statutes are silent regarding additional legal obligations of one spouse to the other Our legislature has not seen fit to bestow a legal right on either partner to any quantum of love, devotion, companionship or commitment from the other Neither has our legislature prescribed how long a neglected spouse must hope, how long a bored spouse must be patient, or how long an abused spouse must endure Possibly, our legislature recognizes that *commitment* to the married state must be generated by the individual and cannot be enforced by law Therefore, a person has no action against his spouse in law or equity for insufficient love and affection, for emotional neglect or even for abuse, apart from the criminal law Where the State has mandated no condition which the married parties must satisfy, the law will give no cause of action for "breach" but only specific grounds for divorce This is in accord with the longstanding "hands-off" policy in the law regarding interference with matters between husband and wife *See, e g*, Schultz, *supra*, 70 Cal L Rev at 232 34

Therefore, in our society, which recognizes husbands and wives as separate individuals, which recognizes that devotion and commitment are personal and perhaps moral obligations but not legal obligations, which refuses to recognize a cause of action by one spouse against the other for failure to love, there is no ground in law or logic for recognizing a cause of action by one spouse against a third party to whom the other spouse has voluntarily transferred his affections The comparison of the action for alienation of affections to actions protecting contractual relationships is superficial and misleading

A similar point was made by the North Carolina Supreme Court in a suit brought by some children for alienation of the affection of their mother The court noted that the mother's love and devotion were "matters within her keeping The measure of their contribution is controlled by her willingness and capacity" *Henson v Thomas* 231 N C 173, 175, 56 S E 2d 432, 434 (1949) The court continued

> Since the mother, who is a free agent, committed no legal wrong for which redress may be had in a court of law, *it cannot be said that the defendant,* who allegedly induced her to be remiss in her domestic duties, *incurred any greater liability than the law attaches to her act*
>
> To hold otherwise would mean that every time a person persuades or induces a mother to engage in other activities to such an extent as to cause her to neglect her children, he commits a tort for which he may be compelled to respond in damages

Id (emphasis added) The majority opinion declares that "a defendant is properly chargeable with the effect of mere acquiescence in the overtures of the alienated spouse where the defendant knows or has reason to know that such acquiescence will damage the marital relationship" This will surely be construed to mean that any person who acquiesces in the advances of another, whom he knows to be married at the time, may be held accountable at law for the subsequent failure of the marriage There is no basis in law for our courts to make such a judgment Accountability for this type of relationship is better left to courts competent to render moral, rather than legal, judgments If the law is to give a remedy against third parties who thus 'intrude' into a marriage with harmful effect, we may next see a cause of action against demanding employers distributors of lascivious movies and books, or even the producers of Monday night football, all of which damage many marriage relationships

It should be noted that the comparison of the action for alienation of affections with recovery for loss of consortium in a wrongful death action is equally superficial In a wrongful death action, the loss of consortium, i e , loss of love, affection and society is simply one way to measure the immeasurable one value of a life is the ability to form relationships and to give and receive affection There is ample basis in statutory and common law for the protection of life In an action for alienation of affection the loss of love and affection is the loss of the relationship itself As already discussed, neither statutory nor common law imposes any obligation on married persons to maintain love or affection for each other There is no legal basis for one spouse to sue the other or a third party for the failure of the relationship The comparison with a wrongful death action is invalid

No one can seriously argue that a husband or wife, even in a troubled marriage, is helpless in the face of temptation If a spouse is pursued by an aggressive third party, as postulated by the majority opinion, and rejects those advances to no avail, he or she can obtain an injunction against harassment, as did the husband in *Webber v Gray*, 228 Ark 289, 307 S W 2d 80 (1957) The action lies with the pursued or annoyed husband or wife, however, not with the spouse for an injury to a legal right If the husband or wife does *not* reject those advances, the betrayal is by the participating spouse against whom the law grants no remedy based on the marital relationship, save divorce Perhaps the individual whose spouse has left him may have an action for intentional infliction of emotional distress

against that spouse or against the spouse and the third party *See Stoker v Stoker*, Utah, 616 P 2d 590 (1980) (confirming wife's right to an action against her husband for the intentional infliction of personal injuries) If the husband and wife have contracted with each other regarding specific marital obligations in addition to those imposed by law, perhaps a remedy for breach of that agreement may be sought by the party wronged In either case, such an action would be brought as any tort or contract action and would not be derived from the marriage relationship itself as alienation of affections purports to be

Devoid of any real basis in law, the action for alienation of affections is frequently upheld instead by moralizing

> The injury for which it was recovered is one of the grossest which can be inflicted upon the husband, and the person who perpetuates it knows it is an offense of the most aggravated character,

Tinker v Colwell, *supra*, 193 U S at 489 90, 24 S Ct at 509 10

> Three thousand dollars is a small sum for such a case A confessed adulterer who has enticed away his neighbor's wife is in no position to say much about excessive damages

Sullivan v Valiquette, *supra* 66 Colo at 172, 180 P at 92

> The grievance is one of a social character, of course The incidence is too deep, however, to be left to the non curial efforts of society itself to correct the antisocial tendencies and activities of its members, the slow-curing and festering wounds which leave cicatricial marks in the wake of the marauder

Henson v Thomas, *supra*, 231 N C at 178, 56 S E 2d at 436 (Seawell, J , dissenting) Often, the moralizing or prejudice operates more subtly The majority opinion quotes from *Heist v Heist*, 46 N C App 521, 265 S E 2d 434 (1980) In North Carolina, a plaintiff must show that the spouses 'were happily married and that a genuine love and affection existed " *Id* at 523, 265 S E 2d at 436 The court in *Heist* found the defendant liable for the failure of the marriage on the flimsiest of evidence of genuine love and affection, disregarding evidence of longstanding disaffection and minimal tolerance between the husband and wife As illustrated in *Heist* and in the instant case, and in every case predicated on alienation of affections, there is an inherent danger that a verdict will rest on the subjective judgment of the factfinder, rather than law In the present case, the trial judge apparently ignored evidence of the plaintiff's violent treatment of his wife, and her independent decision to seek out the company of the defendant At the close of trial, the judge declared

> The Court finds that marriage and family—that marriage is a sacred institution and that anyone who interferes with that should suffer the full consequences of the law and I'm just telling you, Mr Jacobsen, at this time that this Court nearly every week is having criminal trials where people steal money from other people and in my opinion you've stolen something far more than money, you have interfered with the whole basic fabric of society and when you tell me it's a [platonic] relationship, I just say it's nonsense I don't buy it at all and I don't want you to think I do I don't know how they're going to collect any money judgments that I give against you but they're certainly going to get one against you and I hope this gets well publicized because I d like everyone to know that if a case like this comes into my Court, that they can expect to suffer

The people of the State of Utah do not need this cause of action It surely falls among those which do not "necessarily offer effective or efficient means of achieving the public good" Bok, "A Flawed System," Harv Mag 38, 40 (May-June, 1983) Advocating the reduction of volume and cost of litigation, the author of that article points out that "[b]y complicating the rules and insisting on an adversary process conducted by the parties, judges can undermine justice " *Id* at 42 That is precisely what the majority opinion proposes to do the final deaththrows of a broken marriage are to be preserved with a more rigorous and technical set of requirements for recovery Innocent parties must defend themselves, and then assert their right to be free of such actions by suing in separate actions for malicious prosecution or abuse of process Nowhere does the majority point to a basis in law or a benefit to society to justify such a cost to the parties or to our judicial system

As the court stated in *Henson v Thomas*, *supra*, "The mutual rights and privileges of home life grow out of the marital status Such obligations are not legal in nature and may not be made the subject of commerce and bartered at the counter" *Id* 231 N C at 175, 56 S E 2d at 433 It is time that we acknowledge the operation of the process spoken of by Justice Holmes whereby the customs and needs which give rise to a rule disappear but the rule remains, justified by some new policy based on new beliefs and customs Holmes, *The Common Law* 5 (1881) This old "rule" does not have a basis in today's beliefs and customs Its existence now testifies only to the persistence of an old form of action in our common law system and to the understandable but regretable human desire for revenge and a greenback poultice This was a judicially instituted cause of action and should be judicially extinguished, especially since our legislature has never provided a statutory basis for it *See Wyman v Wallace*, *supra* It should not be said of Utah that it is a place

> Where juries cast up what a wife is worth,
> By laying whate'er sum, in mulct they please on
> The lover, who must pay a handsome price,
> Because it is a marketable vice

(Byron, Don Juan, Canto I, lxiv)

Jerry R JARAMILLO, Plaintiff and Respondent,

v

FARMERS INSURANCE GROUP, a corporation, and State Farm Insurance Co., a corporation, Defendants and Appellant

No 18019

Supreme Court of Utah

Sept 1, 1983

Tort victim brought action to recover balance claimed due under terms of settlement agreement reached in compromise of personal injury action The Third District Court, Salt Lake County, Jay E Banks, J , entered judgment in favor of tort victim, and tort feasor's insurer appealed The Supreme Court, Hall C J , held that settlement agreement, by which tort-feasor's insurer agreed to pay tort victim and tort victim's insurer for its payment to tort victim of no fault benefits, was valid and binding on tort victim, therefore, tort victim was not entitled to amount tort-feasor s insurer intended to pay tort victim's insurer

Reversed and remanded

Stewart, J , dissented and filed opinion, in which Durham, J , concurred

1. Insurance ⇐579

Proposition that Automobile No-Fault Insurance Act does not confer a no-fault insurer right of subrogation to funds received by its insured in subsequent action against tort-feasor does not preclude liability insurer from negotiating settlement with tort victim which compromises both its own liability and that of its insured U C A 1953, 31 41 1 et seq

2 Contracts ⇐14

Unexpressed intentions do not affect validity of contract

Tab Q

EXHIBIT 

opinion that if those interests are weighed in their proper relationship to each other, and to the evidence in this case, considerations of justice and equity lead to the conclusion that what happened to Ms. Alsop was the result of other factors involved in her employment and her relationship to it, but was not attributable to her employer unlawfully discriminating against her on account of sex; and that therefore that finding and the judgment thereon should not be permitted to stand.

Emmarae GRIBBLE, Plaintiff and Respondent,

v.

Michael GRIBBLE, Defendant and Appellant.

No. 15453.

Supreme Court of Utah.

July 21, 1978.

Wife brought divorce action against husband, and husband counterclaimed that he was entitled to reasonable visitation rights with his wife's child by a previous marriage, i. e., his stepchild. The Third District Court, Salt Lake County, David K. Winder, J., held that stepfather was not entitled to hearing on issue of visitation, and he appealed. The Supreme Court, Ellett, C. J., held that stepfather was entitled to hearing to determine whether he stood in loco parentis to his stepchild and if so whether it was in child's best interest to grant him right of visitation, and further, whether that right was to be conditioned by his agreement to pay proper share for child support.

Reversed and remanded.

1. Divorce ⇐299

Statute providing guidelines regarding visitation in divorce actions, as amended in 1975, codified traditional common-law rules permitting an equitable investigation into whether it was in welfare of child that parents, grandparents or other relatives be accorded visitation rights and indicated legislative intent to protect relationships which affect child whose parents are being divorced and to be sensitive to fact that relationships beyond those of parent-child may be important enough to protect vis-a-vis visitation. U.C.A.1953, 30 3 5.

2. Divorce ⇐298(1), 299

In proceedings to determine custody and/or visitation, welfare of a minor child is of paramount importance, and divorce courts have broad equitable powers in safeguarding this interest. U.C.A.1953, 30 3 5.

3. Divorce ⇐299

For stepfather to assert visitation rights with respect to his ex-wife's child, he had to stand in relationship of parent, grandparent or other relative to child, keeping in mind paramount concern of child's welfare. U.C.A.1953, 30 3 5.

4. Parent and Child ⇐14

At common law, stepparent and stepchild relationship conferred no rights and imposed no obligations.

5. Parent and Child ⇐15

Term "in loco parentis" means in place of a parent, and a "person in loco parentis" is one who has assumed status and obligations of a parent without formal adoption.

See publication Words and Phrases for other judicial constructions and definitions.

6. Parent and Child ⇐15

Whether or not one assumes status of "person in loco parentis" depends on whether person intends to assume that obligation.

7. Parent and Child ⇐15

Where one stands in loco parentis to another, rights and liabilities arising out of that relation are, as words imply, exactly the same as between parent and child.

8. Constitutional Law ⇐251.6

Implicit in due process clause of State Constitution is that persons be afforded a hearing to determine their rights under the law. Const. art. 1, § 7.

9. Parent and Child ⇐15

Common law concerning termination of loco parentis status is that only surrogate parent or child is able to terminate status at will, and rights, duties and obligations continue as long as they choose to continue relationship.

10. Parent and Child ⇐2(8)

There is a presumption that best interest of child is for him to be reared by his natural parent, although this presumption is one of fact and not of law and may be overcome by sufficient evidence, and welfare of child is controlling.

11. Divorce ⇐299

Statute providing guidelines regarding visitation in divorce actions conceivably allows visitation where custodial rights would not exist; for example, where two natural parents divorce, with custody of their child granted to mother and visitation rights granted to father, and mother then dies, custody would go to father absent evidence of his unfitness, incapacity, etc., as against child's maternal grandparents, but maternal grandparents would have visitation rights which they previously did not have, assuming that court found it was in child's best interest. U.C.A.1953, 30 3 5.

12. Divorce ⇐299

Stepfather was entitled in divorce proceeding to hearing to determine whether he stood in loco parentis to his wife's child and if so whether it was in child's best interest to grant him right of visitation, and further, whether that right should be conditioned upon his agreement to pay a proper share for child support. Const. art. 1, § 7; U.C.A.1953, 30 3 5.

Jonathan H. King, Salt Lake City, for defendant and appellant.

J. Douglas Kinateder, Salt Lake City, for plaintiff and respondent.

ELLETT, Chief Justice:

This case arises out of a divorce action filed by the respondent against the appellant. Respondent has a minor child, her offspring by a previous marriage, born about two months before his mother's marriage to the appellant. Although four children were born to the respondent and the appellant during the time they were together, all four died either at birth or in their infancy. Because of this and because the appellant, the child's stepfather, had never formally adopted him, respondent did not seek child support in her divorce complaint. Appellant counter-claims that he should be entitled to reasonable visitation rights with respondent's son. He claimed that he has treated the child as his own son, feels very close to him, and is concerned about his future welfare. Appellant further offered to pay fifty dollars a month into a trust account for the child's benefit until he reaches eighteen years of age. Appellant lived with the child from the time he was two months old until the respondent and the appellant separated, roughly four years later, and it is uncontested that the child has had no contact with his biological father.

Respondent objected to visitation rights being awarded to the appellant. The trial court held as a matter of law that the appellant (stepparent) was not entitled to a hearing on the issue of visitation. The sole issue raised on appeal, therefore, is whether the appellant stepfather is entitled to a hearing on the issue of visitation rights.

[1-3] *Utah Code Ann.*, Sec. 30 3 5 (1953), as amended, provides guidelines re-

garding custody and visitation in divorce actions:

> When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary. *Visitation rights of parents, grandparents and other relatives shall take into consideration the welfare of the child.* [Emphasis added.]

The 1975 Legislature amended Sec. 30 3 5 to include the last sentence, thereby codifying traditional common law rules permitting an equitable investigation into whether it is in the welfare of the child that parents, grandparents, or other relatives be accorded visitation rights. In proceedings to determine custody and/or visitation, the welfare of a minor child is of paramount importance,[1] and divorce courts have broad equitable powers in safeguarding this interest.[2] The last sentence of Sec. 30 3 5 indicates the legislative intent to protect the relationships which affect the child whose parents are being divorced, and to be sensitive to the fact that relationships beyond those of parent-child may be important enough to protect vis-a-vis visitation. For the appellant to assert visitation rights, he must, therefore, stand in the relationship of parent, grandparent, or other relative to this child, keeping in mind the paramount concern of the child's welfare.

[4] At common law, the stepparent and stepchild relationship conferred no rights and imposed no obligations.[3] In some states this rule has been statutorily amended to require stepparents to provide for their stepchildren so long as the relationship continues.[4] The Colorado Supreme Court in *In re Estate of Iacino*,[5] went so far as to conclude that the word "stepchild" in an inheritance tax statute included the *former* stepchildren of a marriage that ended in divorce prior to the stepparent's death.

[5, 6] Utah has no statutory provision obligating stepparent support, however; and if nothing more existed in the relationship between the appellant and respondent's child, the appellant would not have standing to assert his claims. However, it appears that the appellant may have assumed the status of one in loco parentis to the child which would put him in a different position. The term "in loco parentis" means in the place of a parent, and a "person in loco parentis" is one who has assumed the status and obligations of a parent without formal adoption.[6] Whether or not one assumes this status depends on whether that person *intends* to assume that obligation.[7]

[7] "Where one stands in loco parentis to another, the rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child."[8] The Washington Supreme Court in *In re Hudson*,[9] discussed the rights of parental custody and control and classified

1. *Arends v. Arends*, 30 Utah 2d 328, 517 P.2d 1019 (1974), *Robinson v. Robinson*, 15 Utah 2d 293, 391 P.2d 434 (1964).

2. *Dehm v. Dehm*, Utah, 545 P.2d 525 (1976); *Mecham v. Mecham*, Utah, 544 P.2d 479 (1975).

3. *Estate of Smith v. Nicholson*, 49 Wash.2d 229, 299 P.2d 550 (1956).

4. *Estate of Griffen v. Haugland*, 86 Wash.2d 223, 543 P.2d 245 (1975); *State v. Gillaspie*, 8 Wash.App. 560, 507 P.2d 1223 (1973).

5. 542 P.2d 840 (Colo.1975).

6. *Workman v. Workman*, 498 P.2d 1384 (Okl. 1972); *Sturrup v. Mahan*, 261 Ind. 463, 305 N.E.2d 877 (1974).

7. *Fevig v. Fevig*, 90 N.M. 51, 559 P.2d 839 (1977). See also 59 Am.Jur.2d, Parent & Child, § 88.

8. *Sparks v. Hinckley*, 78 Utah 502, 5 P.2d 570 (1931); see also *In re Tanner*, Utah, 549 P.2d 703 (1976).

9. 13 Wash.2d 673, 126 P.2d 765 (1942).

parental rights and those of persons in loco parentis together as having apparent equivalent status:

> . . . *Parents or those standing in loco parentis to minor children* primarily have the constitutional right to the custody and control of such minor children and may give to those children such attention and training as in the judgment of such parents or guardians may seem best for the welfare of the child or children and for the good of society.[10] [Emphasis added.]

[8] In the instant case, the appellant claims to have lived with his stepson since the child was two months old, treated him "as his own son," and feels concerned about his future. If these claims are true and if they indicate his desire to stand in the place of a parent, then appellant's relationship may entitle him to the same rights accorded to natural parents. Implicit in the due process clause of our state Constitution[11] is that persons be afforded a hearing to determine their rights under the law. If we are to find that the status of loco parentis confers the same rights upon a stepparent as those enjoyed by a natural parent, then a *fortiori*, the rights of the stepparent cannot be terminated without an opportunity to be heard on the matter.

[9] The loco parentis status has been terminated, however, by divorce,[12] although termination by divorce has been determined only in the context of the person in loco parentis making the choice to terminate the status; and not, as here, in the context of the one in loco parentis wishing to continue the status against the wishes of the natural parent. The common law concerning termination of the loco parentis status is that only the surrogate parent or the child is able to terminate the status[13] at will, and the rights, duties, and obligations continue as long as they choose to continue the relationship.[14]

[10, 11] This is an unusual case. Respondent even admits that the appellant loves the child. There is a presumption that the best interest of a child is for it to be reared by its natural parent, although this presumption is one of fact and not of law and may be overcome by sufficient evidence;[15] and, as stated previously, the welfare of the child is controlling. Important also is that the appellant does not seek custody; he wishes only to exercise visitation privileges. Because Sec. 30 3 5 conceivably allows visitation where custodial rights would not exist,[16] this Court feels that there is greater flexibility in determining visitation than there is in determining custody.

A case in point is that of *Spells v. Spells*,[17] a Pennsylvania decision concerning the right of a stepfather to seek visitation rights with his ex-wife's children. The court there said:

> . . . It is our belief that a stepfather may not be denied the right to visit

10. Id., 126 P.2d at 775.

11. Utah Constitution, Art. I, Sec. 7.

12. *Franklin v. Franklin*, 75 Ariz. 151, 253 P.2d 337 (1953).

13. *Taylor v. Taylor*, 58 Wash.2d 510, 364 P.2d 444 (1961); *Chestnut v. Chestnut*, 247 S.C. 332, 147 S.E.2d 269 (1966).

14. See the discussion re stepparents as standing in loco parentis in 59 Am.Jur.2d, Parent and Child, Sec. 91.

15. *Walton v. Coffman*, 110 Utah 1, 169 P.2d 97 (1946); *Baldwin v. Nielson*, 110 Utah 172, 170 P.2d 179 (1946).

16. For example, two natural parents divorce, with custody of their child granted to the mother and visitation rights granted to the father. The mother then dies. Custody would go to the father absent evidence of his unfitness, incapacity, etc. as against the child's maternal grandparents. Even though the maternal grandparents would not have a custodial right as against the father, they would have visitation rights which they previously did not have, assuming the court found it in the child's best interest to give visitation rights to the grandparents.

17. 250 Pa.Super. 168, 378 A.2d 879 (1977).

his stepchildren merely because of his lack of a blood relationship to them Clearly, a stepfather and his young stepchildren who live in a family environment may develop deep and lasting mutual bonds of affection Courts must acknowledge the fact that a stepfather (or stepmother) may be the only parent that the child has truly known and loved during its minority A stepparent may be as devoted and concerned about the welfare of a stepchild as a natural parent would be *Rejection of visitation privileges can not be grounded in the mere status as a stepparent* [Emphasis added]

* * * * * *

Case law is clear that 'the guiding star for the court in coming to a conclusion [in a child custody case] is the welfare of the child To this the rights of parents and all other considerations are subordinate' Thus it is clear that visitation rights of a parent not in custody must be carefully guarded Accordingly, when a stepparent is 'in loco parentis with his stepchildren, courts must jealously guard his rights to visitation

The Pennsylvania court remanded the case to the trial court in order to determine whether or not the stepfather actually stood in loco parentis to his stepchildren, and if so to permit the stepfather to demonstrate that his interest in visitation should be protected

We believe this is a sound view and one which we should adopt

[12] In view of the foregoing, it appears that the appellant may be in loco parentis to respondent's child and that only he or the child and not the respondent, can terminate that relationship If appellant is in loco parentis he should be considered a parent for purposes of Sec 30 3 5 It is consistent with both the statutory intent and with the requirements of due process that he, like a natural parent, grandparent, or any other relative, have a hearing to determine his rights to visitation

The appellant made no offer to pay child support, and certainly he has no legal duty to do so He did offer to set up a trust fund on behalf of the child and to make monthly contributions to that fund It may be that if a stepfather standing in the status of loco parentis is given the opportunity to seek visitation rights as a right afforded a natural parent, that he should not be permitted to escape the duties and obligations of the loco parentis status as long as that relationship remains intact A hearing could determine not only the right to visitation, but could determine whether that right should be conditioned on a requirement that the stepfather accept an obligation to assist in the support of the child This is not only consistent with the concept of loco parentis but may well be necessary to the child's welfare Loco parentis does not envision that a stepparent be permitted to enjoy the rights of a natural parent without also accepting the responsibilities that are incurred

The case is reversed and remanded to the trial court for a hearing to determine whether the appellant stands in loco parentis to his stepchild and if so, whether it is in the child's best interest to grant the appellant a right of visitation, and, further, whether that right should be conditioned by appellant's agreement to pay a proper share for child support No costs are awarded

CROCKETT, MAUGHAN, WILKINS and HALL, JJ , concur

STATE of Utah, Plaintiff and Respondent,

v

Kenneth E PIERREN, Defendant and Appellant

STATE of Utah, Plaintiff and Respondent,

v

EAGLE BOOK, INC and Arthur Adalid, Defendants and Appellants

STATE of Utah, Plaintiff and Respondent,

v

EAGLE BOOK, INC and Luana Hall Haig, Defendants and Appellants

STATE of Utah, Plaintiff and Respondent,

v.

EAGLE BOOK, INC and Willie Williams, Defendants and Appellants

Nos 14912, 15108, 15109 and 15114

Supreme Court of Utah

July 26, 1978

Defendants were convicted in the Second District Court, Weber County, John F Wahlquist, J , of distribution of pornographic material, and they appealed The Supreme Court, Hall, J , held that (1) statute proscribing distribution of pornographic material is constitutional, (2) defendants were not deprived of effective assistance of counsel, (3) courts did not err in failing to define geographical limitation of "community standard" (4) court did not abuse its discretion in refusing to grant change of venue, and (5) persons aged 18 to 20 are not an identifiable group the exclusion of which renders jury list nonrepresentative of community and violative of Fifth and Sixth Amendments

Affirmed

Wilkins, J , concurred and dissented and filed statement in which Maughan, J , concurred

1 Obscenity ⇐2

Statute proscribing distribution of pornographic material is constitutional U C A 1953, 76 10 1204

2 Obscenity ⇐5

In order for material to be found pornographic it must be found to be appealing to prurient interest, depicting sexual conduct in a patently offensive way and lacking in serious literary, artistic, political, or scientific value U C A 1953, 76 10 1204

3 Criminal Law ⇐641 13(1)

Counsel has substantial latitude in selecting trial strategy

4 Criminal Law ⇐641 13(1)

To show inadequate or ineffective counsel, record must establish that counsel was ignorant of facts or law, resulting in withdrawal of crucial defense, reducing trial to a farce and sham

5 Criminal Law ⇐641 13(2)

In prosecution for distribution of pornographic material, closing remarks made by defense counsel admitting that alleged pornographic material depicted sexual conduct in patently offensive way and was lacking in serious literary, artistic, political and scientific value and basing defense on argument that material was not appealing to the prurient interest did not deprive defendants of effective assistance of counsel U C A 1953, 76 10 1204

6 Obscenity ⇐18

For purposes of prosecution for distribution or pornographic material, jury is exclusive judge of what contemporary community standards of intended and probable recipient group is, and in determining contemporary community standard of said group jury may consider divergent ages educated and uneducated, religious and irreligious men and women, and any other characteristics which go to make up an average person of intended and probable recipient group U C A 1953 76 10 1204

Tab R

EXHIBIT R

561 130 A 2d 6 (1957) cited in the main opinion

In the instant case however valuation at fair market value is mandated by article XIII, sections 2 and 3 of the Utah Constitution and its requirements cannot be relaxed in an effort to obtain uniformity and equality also mandated by section 3 In the context of this case, the principle can have no application

HALL, Chief Justice (concurring and dissenting)

I join the Court in declaring the roll back provisions of U C A , 1953, § 59–5–109 (Supp 1981) unconstitutional on their face However, for the same reasons I also view as unconstitutional on their face the provisions of U C A , 1953, § 59–5–4 5 (Supp 1981) which reduce the value of taxable real property assessed by the counties by 20%

Article XIII sections 2 and 3 of the Constitution of Utah in unequivocal language require that all non exempt tangible property both real and personal be assessed at a 'uniform and equal rate" and that it be assessed and taxed according to its value in money"

This Court has long heretofore interpreted the term according to its value in money as the full cash value of the property [1] Also the term 'full cash value' has been determined to be synonymous with the terms actual cash value,' market value" 'reasonable fair cash value and value in money [2]

It is thus to be seen that § 59–5–4 5 is unconstitutional on its face in that it directs the county assessor to assess and tax county assessed property at 80% of its "reasonable fair cash value' rather than at 100% of its value This is precisely the sort of inequality and lack of uniformity that violates the express provisions of article XIII sections 2 and 3 *supra*

The defendants recite the legislative history of the subject statute, which reflects that a disparity was found to exist in the valuation of county assessed and state assessed property The disparity was apparently occasioned by the different valuation methods employed by the state and the counties The counties generally utilized a comparable sales method that readily reflected the effect of inflation upon market value However, the state continued to inflexibly follow its usual cost, income, stock and debt approaches to market value and failed to in any way compensate for the effects of inflation This caused considerable consternation on the part of county assessors who were compelled to assess the property of their constituents at sharply increasing values while state assessments lagged far behind It was to relieve this inequity in assessment that the Legislature enacted the subject statutes However well intentioned the legislative enactments were, they nevertheless do not meet constitutional muster

Article XIII, section 3, *supra*, confers upon the Legislature the obligation and duty to 'provide by law a uniform and equal rate of assessment and taxation" and to prescribe by law such regulations as shall secure a just valuation for taxation of such property ' However, that authority must be read in light of the overriding concept espoused by the constitution i e , that all property be assessed at a "uniform and equal rate," and that it be taxed "according to its value in money" The case of *United States Smelting, Refining & Mining Co v Haynes*,[3] relied upon by the defendants does not hold to the contrary Rather, it is supportive of this basic proposition This is to be seen in that no matter which method or yardstick the Legislature chooses to determine the valuation of property in *money* the end result that must be achieved is just that, i e , "according to its value in money"

1 *State v Thomas* 16 Utah 86 50 P 615 (1897)

2 *Kennecott Copper Corp v Salt Lake County*, 122 Utah 431 250 P 2d 938 (1952)

3 111 Utah 172 176 P 2d 622 (1947)

Viewed in light of what has just been said, the subject legislation causes state assessed and county assessed property to be assessed at *unequal* rates and at values other than *actual market value* Furthermore, the legislation tends to compound rather than alleviate the problem of disparity in assessed valuation This it does by leaving in place and thereby sanctioning the erroneous assessment practices of the state that fail to assess property according to its actual value Rather than legislating so as to insure that the assessment practices of the state be revamped so as to bring them in conformity with constitutional mandate the legislation directs the county assessor to also violate the constitution by assessing property at a rate 20% less than *actual value*

I would reverse the decision of the trial court in its entirety

Gladys Fay WELLS, Guardian ad litem for Dennis Edgar Wells, Jr., a minor over the age of 14 years, Plaintiffs and Respondents,

v

CHILDREN'S AID SOCIETY OF UTAH Successor in Custody of K B., Mother of Infant B., and K B., Defendants and Appellants,

v

John DOE and Mary Doe and Robert D Maack, Esq., Guardian ad litem for Infant B., Intervenors and Appellants

No 18537

Supreme Court of Utah

March 23, 1984

Unwed minor father brought action through guardian ad litem seeking custody of newborn child that had been released to state adoption agency and subsequently to adoptive parents, after father failed to make timely filing of his acknowledgment of paternity as required by statute The Seventh District Court, Grand County Boyd Bunnell J , granted custody of child to father on grounds that statute could not constitutionally be applied to him and mother, agency and adoptive parents appealed The Supreme Court, Oaks J held that (1) statute specifying procedure for terminating parental rights of unwed father is constitutional under due process clause of United States Constitution, (2) such procedure is consistent with due process requirements of Utah Constitution, and (3) agency correctly applied statute on facts of case and did not violate father s federal or state due process rights

Judgment reversed, case remanded with directions

1 Children Out-of-Wedlock ⇐20
Parent and Child ⇐2(1)

The relationship between parent and child is protected by Federal and State Constitutions, these protections include the father of an illegitimate child

2 Infants ⇐155, 156, 157

Constitutionally protected parental rights can be lost they can be surrendered pursuant to statute they can be lost through abandonment of the child by inaction or course of conduct for which parent is personally responsible, such rights can also be terminated through parental unfitness or substantial neglect U C A 1953 78–30–4(1 2) 78–30–5

3 Adoption ⇐11

To serve its purpose for welfare of child determination that newborn child can be adopted must be final as well as immediate

4 Adoption ⇐7 2(3)

The state s strong interest in immediate secure adoptions for eligible newborns provides a sufficient justification for significant variations in parental rights of unwed fathers who in contrast to mothers are not automatically identified by virtue of their role in the process of birth

5 Constitutional Law ⇐242 1(1)
Infants ⇐132

Statute specifying procedure for terminating parental rights of unwed father requiring father to file acknowledgment of paternity prior to date child is released to

state adoption agency does not violate equal protection clause as there is rational basis for distinguishing between unwed mothers and fathers and between fathers who file and fathers who do not, classifications are reasonably calculated to serve proper governmental objective U C A 1953, 78-30-4(3), U S C A Const Amend 14

6 Constitutional Law ⇐17

In sustaining constitutionality of a statute under due process clause, the Supreme Court must consider both possibility that statute is invalid on its face and possibility that statute is invalid as applied U S C A Const Amends 5, 14, Const Art 1 § 7

7. Constitutional Law ⇐251 6

The test of procedural due process concerning validity of rules regarding notice and opportunity to be heard is fairness U S C A Const Amends 5, 14, Const Art 1, § 7

8 Constitutional Law ⇐252 5

Substantive due process concerns content of rules specifying when a right can be lost or impaired, this question can arise in context of a hearing where procedural formalities were observed U S C A Const Amends 5, 14, Const Art 1, § 7

9 Constitutional Law ⇐252 5

A due process question can arise when a statute provides that a particular right is automatically lost or impaired in specific circumstance, without any notice or hearing, except insofar as may be involved in an after the fact declaration that circumstances have occurred and right has been lost or impaired U S C A Const Amends 5, 14, Const Art 1, § 7

10 Constitutional Law ⇐274(5)

A termination of parental rights must be tested against a more stringent standard than that used to determine the validity of economic regulation under substantive due process U S C A Const Amends 5, 14, Const Art 1, § 7

11 Children Out of-Wedlock ⇐20
Constitutional Law ⇐274(5)

Statute specifying procedure for terminating parental rights of unwed father, requiring father to file acknowledgement of paternity prior to date child is released to state adoption agency, was not arbitrary under rule of *Lehr v Robertson*, thus, statute was constitutional under due process clause of United States Constitution U S C A Const Amends 5, 14

12 Constitutional Law ⇐274(5)

To avoid unwarranted intrusion on fundamental rights of parenthood, state's due process clause requires higher level of scrutiny than is exercised to determine validity of economic regulation, the proponent of legislation infringing parental rights must show a compelling state interest in the result to be achieved and that the means adopted are narrowly tailored to achieve basic statutory purpose U C A 1953, 78-30-4(3), Const Art 1, § 7

13 Constitutional Law ⇐274(5)

In determining validity under State Constitution, pursuant to substantive due process analysis, of statute providing that an unwed male parent could lose his parental rights in a newborn infant for failing to file timely notice of his claim to paternity, the Supreme Court measured the statutory specification for termination against tests of compelling state interest and narrowly tailored means U C A 1953, 78-30-4(3), Const Art 1, § 7

14. Constitutional Law ⇐274(5)

Due process does not require that the father of an illegitimate child be identified and personally notified before his parental right can be terminated, as such a requirement would frustrate compelling state interest in speedy determination of those persons who will assume a parental role over newborn illegitimate children and would threaten privacy interests of unwed mothers U C A 1953, 78-30-4(3), Const Art 1, § 7

15 Children Out-of-Wedlock ⇐20
Constitutional Law ⇐274(5)

In light of compelling state interest in summary determination prescribed in statute and of fact that statutory terms were narrowly tailored to achieve basic statutory purpose, statutory provisions for terminating parental right of unwed father of newborn infant requiring father to file acknowledgement of paternity prior to date child is released to state adoption agency, were facially valid under due process clause of State Constitution U C A 1953, 78-30-4(3), Const Art 1, § 7

16 Constitutional Law ⇐274(5)

Where birth of child occurred in same state as unwed father's residence, neither child's mother nor state adoption agency was involved in any effort to prevent him from learning of birth or from asserting his parental rights, neither mother nor agency knew at time child was relinquished that father was seeking to or intending to assert his parental rights, all father needed to do to assert his rights was to file claim of paternity prior to date mother relinquished child, and father had sufficient opportunity to do so and had advice of counsel on filing required form, agency, in applying statute allowing such procedures, did not violate father's federal or state due process rights U C A 1953, 78-30-4(3), Const Art 1, § 7, U S C A Const Amends 5, 14

Jane A Marquardt, Salt Lake City, for K B & Children's Aid

Tim W Healy, Ogden, for John & Mary Doe

Robert D Maack, pro se

Paul Gotay, Midvale, for plaintiffs and respondents

OAKS, Justice

This appeal involves the constitutionality of U C A, 1953, § 78-30-4(3), which terminates the parental rights of the father of an illegitimate child if he fails to give the required timely notice of his claim of paternity The district court concluded that the notice requirement could not constitutionally be applied to this father because he was denied a reasonable opportunity to comply We reverse

K B, a 16 year old unmarried girl residing in Moab, gave birth to a child About six days earlier, she had traveled from Moab to Ogden, where the child was born September 23, 1981 She had previously arranged with appellant Children's Aid Society, a licensed agency, to receive the child for adoption immediately after its birth

On September 24, K B signed the consent and release that placed the child in the custody of Children's Aid On September 23, 24, 25, and 28, representatives of Children's Aid contacted the office of the registrar of Vital Statistics in the Department of Health by telephone to determine whether an acknowledgment of paternity form had been filed regarding the child They were informed each time that no form had been received On September 25 Children's Aid placed the child Infant B, in the home of intervenors John and Mary Doe for purposes of adoption On September 28, the Department of Health issued its official certificate of search verifying that no acknowledgment of paternity had been filed This certificate assured both Children's Aid and the adoptive parents that the child could be adopted without notice to the natural father [1]

On September 30, the Department of Health notified the Children s Aid Society that they had received an acknowledgment of paternity form signed by Dennis E Wells, Jr, the plaintiff in this case The form arrived by mail at the Department's office in Salt Lake City on September 30 in an envelope post marked Moab, Utah, September 23 Children's Aid took no action to alter the child's placement for adoption

Dennis filed this action, through his guardian ad litem, on October 6, 1981, seeking custody of the child The complaint alleged that Children's Aid and K B had fraudulently concealed the facts surrounding the infant's birth to deprive him of his parental rights

The evidence at trial showed that Dennis and K B, who were both sophomores in high school, had sexual relations in the fall of 1980, the last occurring on December 23,

1 The certificate of search is required before a court can grant a final decree of adoption it is not a prerequisite to the placement of a child in an adoptive home § 78 30-4(3)(d)

1980 In January of 1981, K B informed Dennis that she thought she was pregnant Thereafter he refused to speak to her and they ceased dating K B did not begin dating anyone else until approximately one month later K B 's pregnancy was not medically confirmed until August At that time K B 's boyfriend informed Dennis of the pregnancy, and Dennis discussed it with his parents He never discussed the pregnancy or had any other communications with K B

Gladys Fay Wells, Dennis s mother, learned about the pregnancy on September 2 She immediately contacted the physician who had confirmed the pregnancy and he advised her that the probable date of birth was September 22 or 23 Mrs Wells was very concerned about the child On September 4 she contacted K B and offered financial support and help with the child s upbringing When K B expressed a desire to put the child up for adoption, Mrs Wells attempted to dissuade her In mid September, Mrs Wells also contacted an attorney in Moab to determine what steps were required to obtain the child if Dennis decided to assert his parental rights She and Dennis were informed about the need for filing an acknowledgment of paternity certificate and were instructed to obtain forms from the Department of Social Services On September 15 Mrs Wells met with Walter Miller, a social worker with that department and they discussed the need for filing the certificate Miller obtained the forms and gave them to Mrs Wells on September 17 On September 14, Mrs Wells and Dennis had met in Moab with Colleen Burnham of Children s Aid Society Mrs Wells expressed a desire to raise the child if K B decided to relinquish it but Dennis who remained mostly silent at this meeting was equivocal never indicating positively whether or not he desired to assert his paternal rights

On September 17 Mrs Wells learned that K B had gone to Ogden to have the baby The baby was born on September 23 and Mrs Wells and Dennis learned of the birth that same day Although Dennis had signed the form on September 18, he did not mail it until September 23, the day before K B relinquished custody to Children's Aid Dennis claimed that he waited to ensure that the baby was his, since if the baby had been born any later he believed that someone else would have been the father

After a nonjury trial, the court granted custody of the child to Dennis Although Dennis did not make a timely filing of his acknowledgment of paternity as required by § 78-30-4(3)(b), the court held that this statute could not constitutionally be applied to him because he was "denied a reasonable opportunity to file his acknowledgment of paternity prior to placement of the child by Children's Aid Society" However, judgment for Dennis was stayed pending appeal, and the infant remained with the adoptive parents

I THE CONSTITUTIONAL RIGHT OF THE FATHER

[1] The relationship between parent and child is protected by the federal and state constitutions *In re J P*, Utah, 648 P 2d 1364 (1982) These protections include the father of an illegitimate child *Id* at 1374-75, *Stanley v Illinois*, 405 U S 645, 92 S Ct 1208, 31 L Ed 2d 551 (1972) *Miller v Miller*, 504 F 2d 1067 (9th Cir 1974) Insofar as it suggests otherwise, *Thomas v Children s Aid Society of Ogden*, 12 Utah 2d 235, 239, 364 P 2d 1029, 1031-32 (1961), has now been overruled Also see *State in Interest of M*, 25 Utah 2d 101, 107, 476 P 2d 1013, 1016-17 (1970) (first recognition of a "statutory parent child relationship in unwed father who acknowledges paternity)

[2] Although parental rights have their origin in biological relationships, those relationships do not guarantee the permanency of parental rights Constitutionally protected parental rights can be lost They can be surrendered pursuant to statute U C A , 1953, § 78-30-4(1), (2) They can be lost through abandonment of the child by "inaction or a course of conduct for which the parent is personally responsible"

In re J Children Utah, 664 P 2d 1158, 1159 (1983), § 78-30-5 Parental rights can also be terminated through parental unfitness or substantial neglect *Eg*, *In re Castillo*, Utah, 632 P 2d 855 (1981)

II THE STATE'S INTEREST

There are special problems in defining parental rights over newborns who are illegitimate The identity of the father may be unknown The mother may desire to give the child up for adoption The state has a strong interest in speedily identifying those persons who will assume the parental role over such children, not just to assure immediate and continued physical care but also to facilitate early and uninterrupted bonding of a child to its parents The state must therefore have legal means to ascertain within a very short time of birth whether the biological parents (or either of them) are going to assert their constitutional rights and fulfill their corresponding responsibilities or whether adoptive parents must be substituted

[3] To serve its purpose for the welfare of the child, a determination that a child can be adopted must be final as well as immediate Thus, in rejecting a mother s attempt to recover her child about eight months after she had given it up for adoption, this Court declared

> It is and should be the policy of the law to so operate as to encourage the finding of suitable homes and parents for children in that need It is obvious that persons who might be willing to accept a child for adoption will be more reluctant to do so if a consenting parent is permitted to arbitrarily charge [change] her mind and revoke the consent, and thus desolate the plan of the adoptive parents and bring to naught all of their time, effort, expense and emotional involvement A moment's reflection will reveal that to the degree that such commitments are given respect and solidarity, so they can be relied upon, persons desiring children will be willing to accept and give them homes Conversely, to the degree that such commitments can easily be withdrawn and the adoptive plan thus destroyed, such persons will tend to be discouraged from doing so

In re Adoption of F—, 26 Utah 2d 255, 262 488 P 2d 130 134 (1971) *Accord Matter of S*, Utah, 572 P 2d 1370 (1977) These considerations obviously set limits to the rights of fathers as well as mothers

[4] The state s strong interest in immediate and secure adoptions for eligible newborns provides a sufficient justification for significant variations in the parental rights of unwed fathers, who, in contrast to mothers, are not automatically identified by virtue of their role in the process of birth Relying on leading decisions in the United States Supreme Court, we have said that fathers who have "fulfilled a parental role over a considerable period of time are entitled to a high degree of protection,' whereas unwed fathers "whose relationships to their children are merely biological or very attenuated" are entitled to a lesser degree of protection *In re J P* 648 P 2d at 1375

The United States Supreme Court applied a rationale of variable parental rights in *Lehr v Robertson* — U S — 103 S Ct 2985, 2991, 77 L Ed 2d 614 (1983) where it referred to the fact that "the rights of the parents are a counterpart of the responsibilities they have assumed" Later in its opinion the Court elaborated this idea and applied it to an unwed father who had no custodial, personal or financial relationship with the infant involved in that case

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the due process clause *But the mere existence of a biological link does not merit equivalent constitutional protection*

Id 103 S Ct at 2993 (Emphasis added, citation omitted) While *Lehr* involved a two year old rather than a n whorn it is the closest United States Supreme Court case on its facts and its reasoning is persuasive on the issue before us

III. THE STATUTE

In § 78-30-4(3), our Legislature has undertaken to resolve the competing interests of the newborn illegitimate child and the man who claims to be its father. This statute provides a means (1) of promptly determining whether there is a man who will acknowledge paternity and assume the responsibilities of parenthood and, if not, (2) of speedily making the child available for adoption. Subsection (a) provides:

> A person who is the father or claims to be the father of an illegitimate child may claim rights pertaining to his paternity of the child by registering with the registrar of vital statistics in the department of health, a notice of his claim of paternity of an illegitimate child and of his willingness and intent to support the child to the best of his ability.

Subsection (b) provides that the notice "may be registered prior to the birth of the child but *must be registered prior to the date the illegitimate child is relinquished or placed with an agency licensed to provide adoption services* ...." (Emphasis added.) Subsection (c) then provides as follows:

> Any father of such child who fails to file and register his notice of claim to paternity and his agreement to support the child *shall be barred from thereafter bringing or maintaining any action to establish his paternity of the child.* Such failure shall further constitute an abandonment of said child and a waiver and surrender of any right to notice of or to a hearing in any judicial proceeding for the adoption of said child, and *the consent of such father to the adoption of such child shall not be required.*

(Emphasis added.)

On appeal from the district court's decision not to apply the foregoing statute in this case, the parties have joined issue on the constitutionality of § 78-30-4(3), on its face and as applied to the circumstances of this case.

[5] In *Ellis v. Social Services Department*, Utah, 615 P.2d 1250 (1980), we sustained § 78-30-4(3) against a claim that it violated the Equal Protection Clause. Implicit in that decision was the holding that there are reasonable bases for the classifications in the statute (between unwed mothers and fathers and between fathers who file and fathers who do not) and that these classifications are reasonably calculated to serve a proper government objective.

[6] The claim that this statute was facially invalid under the Due Process Clause of the federal or state constitutions was not resolved in *Ellis*, because the Court found that in any event the statute violated due process as applied to terminate the father's parental rights on the facts of that case. In this case, where we sustain the statute in its termination of the father's rights, we must face both possibilities of unconstitutionality under due process: invalid on its face and invalid as applied.

IV. DUE PROCESS

A. In General

[7] Most due process cases concern *procedural* requirements, notably notice and opportunity to be heard, which must be observed in order to have a valid proceeding affecting life, liberty, or property. *E.g., Nelson v. Jacobsen*, Utah, 669 P.2d 1207 (1983); *State v. Casarez*, Utah, 656 P.2d 1005 (1982); *Concerned Parents of Stepchildren v. Mitchell*, Utah, 645 P.2d 629, 636 (1982); *Lindon City v. Engineers Construction Co.*, Utah, 636 P.2d 1070 (1981). The general test for the validity of such rules, the test of *procedural* due process, is fairness.

[8] *Substantive* due process concerns the content of the rules specifying when a right can be lost or impaired. This question can arise in the context of a hearing where the procedural formalities were observed. Thus, in *In re J.P., supra*, the statute was unconstitutional on its face because it provided that a judge could deprive parents of their parental rights "without a showing of unfitness, abandonment, or substantial neglect...." 648 P.2d at 1375. That holding assumed that the judge's hearing met all the requirements of procedural due process, but concluded that the statute was invalid in its substantive content.

[9] A due process question can also arise when a statute provides that a particular right is automatically lost or impaired in a specific circumstance (without any notice or hearing, except insofar as may be involved in an after-the-fact declaration that the circumstances have occurred and the right has been lost or impaired).[2] Section 78-30-4(3), challenged in this case, is such a statute. Whether a due process challenge to this common type of legislation is procedural because the statute omits notice and hearing or substantive because it specifies a particular substantive rule is comparatively unimportant.

The almost universal opinion that substantive due process was abused in invalidating economic regulations in the first third of this century has culminated in a rational basis test so tolerant that the substantive content of economic statutes rarely violates due process. *See generally* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup.Ct.Rev. 34, 39; R. Lee, *A Lawyer Looks at the Constitution*, 164-67 (1981). Our own decisions illustrate this conclusion. *E.g., Committee of Consumer Services v. Public Service Commission*, Utah, 638 P.2d 533, 536 (1981); *Banberry Development Corp. v. South Jordan City*, Utah, 631 P.2d 899 (1981); *Redwood Gym v. Salt Lake County Commission*, Utah, 624 P.2d 1138, 1142-43 (1981); *Baker v. Matheson*, Utah, 607 P.2d 233, 244 (1979); *Magleby v. State Department of Business Regulations*, Utah, 564 P.2d 1109, 1110 (1977). The presumption of constitutionality applied in these cases is further assurance that economic regulations will rarely be upset as violative of substantive due process.

2. For example, in *Freeman v. Centerville City*, Utah, 600 P.2d 1003 (1979), we rejected a property owner's contention that our annexation statutes violated the due process clause in Art. I, § 7 of the Utah Constitution because they did not require that affected property owners be given notice of the proceedings and an opportunity to elect whether their property should be made subject to taxation and other burdens in the annexing city.

[10] In contrast to the test used to determine the validity of the economic regulations involved in the foregoing cases, a termination of parental rights must be tested against a more stringent standard, as discussed below. *See generally Developments in the Law—the Constitution and the Family*, 93 Harv.L.Rev. 1157, 1167 (1980).

B. United States Constitution

In *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the Supreme Court held that a statute terminating parental rights of all unwed fathers without a hearing violated due process. Statutes like § 78-30-4(3) are responses to that decision, attempting to specify procedures by which the parental rights of unwed fathers can be terminated and the rights of adoptive parents can be assured in a manner consistent with due process.

In *Lehr v. Robertson*, — U.S. —, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), the United States Supreme Court had its most recent opportunity to review such a statute. Under New York law, as the trial court had held, the rights of natural parents are terminated by a final decree of adoption. *In re Adoption of Martz*, 102 Misc.2d 102, 423 N.Y.S.2d 378 (1979), *aff'd sub nom. Lehr v. Robertson, supra*. On appeal, the unwed father attacked a decree granting adoption of his two-year-old daughter. The father argued that he had received no notice of the adoption proceeding. The statute provided for notice to an unwed father, but only if he had filed a notice of intent to claim paternity with the putative father registry of the Department of Social Services, which this appellant had not done. Rejecting appellant's claim that the statute was a procedurally inadequate means to terminate parental rights of this character, the Supreme Court held the statute constitutional.

> The New York legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees. Regardless of whether we would have done likewise if we were legislators instead of judges, *we surely cannot characterize the state's conclusion as arbitrary.*

Id. 103 S.Ct. at 2995 (emphasis added).

[11] Measuring § 78-30-4(3) against the precedent and standard established in *Lehr v. Robertson*, we hold that the procedure it specifies for terminating the parental rights of an unwed father is not "arbitrary" and is therefore constitutional under the Due Process Clause of the United States Constitution.

C. Utah Constitution

We likewise hold that § 78-30-4(3) is consistent with the due process requirements of Art. I, § 7 of the Utah Constitution.

[12] In this instance we apply a more stringent standard of review than "arbitrariness" or the rational basis test applicable to economic regulation challenged as violative of due process. *In re J.P., supra*, identified parental rights as "fundamental" for purposes of due process. 648 P.2d at 1372-74. In the context of alleged vagueness in statutory language, we have held that "[w]hen state action impinges on fundamental rights, due process requires standards which clearly define the scope of permissible conduct so as to avoid unwarranted intrusion on those rights." *In re Boyer*, Utah, 636 P.2d 1085, 1087-88 (1981). Similarly, "to avoid unwarranted intrusion" on the fundamental rights of parenthood we hold that Utah's Due Process Clause requires a higher level of scrutiny than is exercised to determine the validity of economic regulation. By analogy to the tests employed in judging the validity of alleged infringements on other fundamental rights, we hold that the proponent of legislation infringing parental rights must show (1) a compelling state interest in the result to be achieved and (2) that the means adopted are "narrowly tailored to achieve the basic statutory purpose." *Id.* at 1090.

In re J.P., supra, established a general rule against the termination of parental rights, except for designated causes. We explained the basis for exceptions to this fundamental right as follows:

> The principle that "the welfare of the child is the paramount consideration" means that parental rights, though inherent and retained, are not absolute; that the state, as *parens patriae*, has the authority and obligation to assume a parental role after the natural parent has been shown to be unfit or dysfunctional; and that parental prerogatives cannot, at that extreme point, frustrate the state in discharging its duty.

648 P.2d at 1377.

[13] The question in this case is whether the constitutional right we recognized in *In re J.P.* permits the exception inherent in § 78-30-4(3)'s provision that an unwed male parent will lose his parental rights in a newborn infant for failing to file a timely notice of his claim to paternity. We treat that question in light of our earlier holding that an unwed father's right to his relationship with his newborn is a provisional right by comparison with the vested right of a parent who has fulfilled a parental role over a considerable period of time. *In re J.P.*, 648 P.2d at 1374-75. We measure the statutory specifications for the termination of that provisional right against the tests of compelling state interest and narrowly tailored means.

For the reasons already reviewed in Part II, the state has a compelling interest in speedily identifying those persons who will assume a parental role over newborn illegitimate children. Speedy identification is important to immediate and continued physical care and it is essential to early and uninterrupted bonding between child and parents. If infants are to be spared the injury and pain of being torn from parents with whom they have begun the process of bonding and if prospective parents are to rely on the process in making themselves available for adoptions, such determinations must also be final and irrevocable.

[14] Section 78-30-4(3) is narrowly tailored to achieve the purposes identified above. No infringement of the unwed father's rights not essential to the statute's purposes has been identified. Due process does not require that the father of an illegitimate child be identified and personally notified before his parental right can be terminated. In the common cases of unwed fathers without desires to assume the responsibilities and to claim the rights of parenthood, such a requirement would frustrate the compelling state interest in the speedy determination described above. It would also threaten the privacy interests of unwed mothers and frustrate the other interests the United States Supreme Court cited in *Lehr v. Robertson, supra*, quoted in Part IVB.

[15] In view of the compelling state interest in the summary determination prescribed in the statute and of the fact that the statutory terms are narrowly tailored to achieve the basic statutory purpose, we hold that § 78-30-4(3)'s provisions for terminating the parental right of the unwed father of a newborn infant are facially valid under the Due Process Clause in Art. I, § 7 of the Utah Constitution.

D. Constitutionality as Applied

Finally, we inquire whether the statute was constitutionally applied in the circumstances of this case.

At the outset, it is clear that the exception defined in *Ellis v. Social Services Department, supra*, is inapplicable. In that case, the parents of the illegitimate child both lived in California. A few days before she was to give birth, the mother left California without the father's knowledge and came to Utah. In this state, she gave birth, declared the father to be unknown, and relinquished the child to an agency for adoption. Immediately upon learning of her whereabouts and within six days of the child's birth, the father notified the agency by phone that he intended to assert his parental rights. Within two weeks thereafter, he filed the statutory notice in Utah and filed suit to secure his rights. This Court held that the statute could not be applied to deprive this father of his parental rights without a hearing at which he would have "an opportunity to present evidence to show as a factual matter that he could not reasonably have expected his baby to be born in Utah." 615 P.2d at 1256. The Court explained the limits of its ruling as follows:

> In the usual case, the putative father would either know or reasonably should know approximately when and where his child was born. It is conceivable, however, that a situation may arise when it is *impossible* for the father to file the required notice of paternity prior to the statutory bar, *through no fault of his own*. In such a case, due process requires that he be permitted to show that he was *not afforded a reasonable opportunity* to comply with the statute.

Id. at 1256 (emphasis added).

[16] In sharp contrast to *Ellis*, this case does not involve circumstances where through no fault of his own it was "impossible" for the father to file the required notice. Here the birth occurred in the same state as the father's residence, and neither the child's mother nor the agency was involved in any effort to prevent him from learning of the birth or from asserting his parental rights. Neither the mother nor the agency knew at the time the child was relinquished that the father was seeking to or intending to assert his parental rights. All the father needed to do to assert his rights was file his claim of paternity with the Utah Department anytime prior to September 24, the date the mother relinquished the child to the agency. He had sufficient opportunity to do so in this case, including ample advance notice of the expected time of birth and the fact that the mother intended to relinquish the child for adoption, advice of counsel on filing the required form, and a copy of the

form provided by a social worker for the department These opportunities exceed what is necessary to contradict either one of the two essential elements of the *Ellis* exception it was (1) "impossible" for the father to make a timely filing of the required notice (2) "through no fault of his own'

In apparent reliance on the *Ellis* statement that due process requires that the father be allowed to show "he was not afforded a reasonable opportunity to comply with the statute," the district court held that § 78-30-4(3) could not be applied to terminate the father's parental right in this case Such an interpretation overlooks the fact that the "reasonable opportunity" referred to in the quoted sentence only applies "in such a case," i e , when it is first shown that it was "impossible" for the father to file "through no fault of his own ' Otherwise, the need to prove in each adoption case that the unwed father—whoever he may be—had a "reasonable opportunity" to file the required notice of paternity would frustrate the statute's purpose to facilitate secure adoptions by early clarification of status

In *Lehr v Robertson, supra,* the United States Supreme Court rejected a similar argument that the unwed father should have received special notice of the adoption proceeding because, on the facts of that case, the trial court and the parties knew that he had filed a separate proceeding to establish his parental rights The Supreme Court declared

> This argument amounts to nothing more than an indirect attack on the notice provisions of the New York statute The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also *justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute* Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with Jessica, *we find no merit in the claim that his constitutional rights were offended because the family court strictly complied with the provisions of the statute*

103 S Ct at 2995 (emphasis added) In applying that reasoning, the Court also noted that the right to receive notice of the adoption proceeding "was completely within appellant's control" *Id*

We agree with the reasoning in *Lehr v Robertson,* and we therefore hold that the agency correctly applied § 78-30-4(3) on the facts of this case and did not violate federal or state due process rights

The judgment is reversed, and the case is remanded with directions to enter judgment for the defendants Each party to bear own costs

HALL, C J , and STEWART, HOWE and DURHAM, JJ , concur

Nolan W. MARSHALL, Plaintiff,

v.

The INDUSTRIAL COMMISSION OF the STATE OF UTAH, Emery Mining Co , (Employer), and/or the State Insurance Fund of Utah, and the Second Injury Fund, Defendants.

No 19153.

Supreme Court of Utah

April 5, 1984

Mine employee denied permanent total disability benefits after work related accident when he was 67 years old sought review of decision of the Industrial Commission denying him such benefits The Supreme Court, Durham, J , held that (1) total disability for workers' compensation purposes does not mean total physical impairment, and (2) denial of permanent total disability benefits to mine employee, based almost entirely on size of employee's percentage of impairment and fact that employee was eligible to retire, rather than on evidence of employee's wage earning capacity, was unsupported by the Commission's findings of fact, and would be set aside

Reversed and remanded

Hall C J , dissented and filed an opinion in which Howe, J , joined

1. Workers' Compensation ⇐803

'Disability" under the worker s compensation laws, is loss of ability to earn U C A 1953, 35-1-67

See publication Words and Phrases for other judicial constructions and definitions

2 Workers' Compensation ⇐836

An undisputed physical impairment may not always result in a disability for worker's compensation purposes

3 Workers' Compensation ⇐803

In assessing loss of earning capacity from an injury for workers' compensation purposes, a constellation of factors must be considered, only one of which is physical impairment of the worker, other factors are age education, training and mental capacity

4 Workers' Compensation ⇐817

Total disability for workers' compensation purposes does not mean total physical impairment U C A 1953, 35-1-67

5. Workers' Compensation ⇐817

Whether an employee falls into the odd lot category, under which total disability for workers' compensation purposes may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well known branch of the labor market, depends on whether there is regular, dependable work available for the employee, who does not rely on sympathy of friends or his own superhuman efforts

6 Workers' Compensation ⇐1377

Once an employee who has suffered a work related accident has presented evidence that he can no longer perform the duties required in his occupation and that he cannot be rehabilitated, the burden shifts to the employer to prove the existence of regular, steady work that the employee can perform, taking into account the employee's education, mental capacity, and age to avoid finding that the employee is totally and permanently disabled under the odd lot doctrine U C A 1953, 35-1-67

7 Workers' Compensation ⇐1947

Supreme Court may set aside an Industrial Commission's award in a workers' compensation case if the Commission's findings of fact do not support the award U C A 1953, 35-1-84

8. Workers' Compensation ⇐1653

Mine employee who injured his back in work related accident at age 67, after a 40 year history of heavy labor in the mines, who had less than a high school education, and who presented uncontroverted evidence of his impairment and his inability to perform work required by his job, along with an opinion of the division of vocational rehabilitation that he could not be rehabilitated, presented a prima facie case that he fell into the odd lot category for an award of workers' compensation, even though his combined impairment totaled only 26% U C A 1953, 35-1-67

9 Workers' Compensation ⇐1639

Where Industrial Commission's denial of permanent disability benefits to 67 year old mine worker injured in a work related accident appeared to rest almost entirely on size of employee's percentage of impairment and on fact that employee was eligible to retire, rather than on evidence of employee s wage earning capacity, such denial of permanent total disability benefits was unsupported by findings of fact U C A 1953, 35-1-67, 35-1-84

Tab S

EXHIBIT S

COLLATERAL REFERENCES

Am. Jur 2d. — 62A Am Jur 2d Pretrial Conference and Procedure § 1 et seq

C.J.S. — 88 C.J.S. Trial § 17(2)

A.L.R. — Failure of party or his attorney to appear at pretrial conference 55 A.L.R. 3d 303

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings 63 A.L.R. 4th 712

Consideration or submission at trial under Rule 16 of Federal Rules of Civil Procedure of issues not fixed for trial in pretrial order 11 A.L.R. Fed. 786

Validity and effect of local district court rules providing for use of alternative dispute resolution procedures as pretrial settlement mechanisms 86 A.L.R. Fed. 211

Imposition of sanctions under Rule 16(f) Federal Rules of Civil Procedure for failing to obey scheduling or pretrial order 90 A.L.R. Fed. 157

Key Numbers. — Trial ⇨ 9(1)

PART IV.

PARTIES.

Rule 17. Parties plaintiff and defendant.

(a) **Real party in interest.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) **Minors or incompetent persons.** A minor or an insane or incompetent person who is a party must appear either by a general guardian or by a guardian ad litem appointed in the particular case by the court in which the action is pending. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted expedient to represent the minor, insane or incompetent person in the action or proceeding, notwithstanding that the person may have a general guardian and may have appeared by the guardian. In an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown party who might be a minor or an incompetent person.

(c) **Guardian ad litem; how appointed.** A guardian ad litem appointed by a court must be appointed as follows:

(1) When the minor is plaintiff, upon the application of the minor, if the minor is of the age of fourteen years, or if under that age, upon the application of a relative or friend of the minor;

(2) When the minor is defendant, upon the application of the minor if the minor is of the age of fourteen years and applies within 20 days after the service of the summons, or if under that age or if the minor neglects so to apply, then upon the application of a relative or friend of the minor, or of any other party to the action;

(3) When a minor defendant resides out of this state, the plaintiff, upon motion therefor, shall be entitled to an order designating some suitable person to be guardian ad litem for the minor defendant, unless the defendant or someone in behalf of the defendant within 20 days after service of notice of such motion shall cause to be appointed a guardian for such minor. Service of such notice may be made upon the defendant's general or testamentary guardian located in the defendant's state; if there is none, such notice, together with the summons in the action, shall be served in the manner provided for publication of summons upon such minor, if over fourteen years of age, or, if under fourteen years of age, by such service on the person with whom the minor resides. The guardian ad litem for such nonresident minor defendant shall have 20 days after appointment in which to plead to the action.

(4) When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

(d) **Associates may sue or be sued by common name.** When two or more persons associated in any business either as a joint-stock company, a partnership or other association, not a corporation, transact such business under a common name, whether it comprises the names of such associates or not, they may sue or be sued by such common name. Any judgment obtained against the association shall bind the joint property of all the associates in the same manner as if all had been named parties and had been sued upon their joint liability. The separate property of an individual member of the association may not be bound by the judgment unless the member is named as a party and the court acquires jurisdiction over the member.

(e) **Action against a nonresident doing business in this state.** When a nonresident person is associated in and conducts business within the state of Utah in one or more places in that person's own name or a common trade name, and the business is conducted under the supervision of a manager, superintendent or agent the person may be sued in the person's name in any action arising out of the conduct of the business.

(Amended effective September 1, 1991.)

Advisory Committee Note. — Paragraph (d) has been changed to conform to the holding in *Cottonwood Mall Co. v. Sine*, 767 P.2d 499 (Utah 1988), which allows an unincorporated association to sue in its own name. The rule continues to allow an unincorporated association to be sued in its own name. The final sentence of paragraph (d) was added to confirm that the separate property of an individual member of an association may not be bound by the judgment unless the member is made a party.

Technical changes in all paragraphs of the rule make the terminology gender neutral. In part (c) the word "minor" has replaced the word "infant," in order to maintain consistency with recent changes made in Rule 4(e)(2). In Rule 4 an infant is defined as a person under the age of 14 years, whereas the intent of Rule 17(c) is to include persons under the age of 18 years.

Amendment Notes. — The 1991 amendment, effective September 1, 1991, substituted "minor" for "infant" throughout Subdivisions (b) and (c); in Subdivision (d), substituted "sue or be sued" for "be sued" in the heading and the first sentence, divided the former language into the present first two sentences, in the second sentence substituted "the association" for "the defendant" and "parties" for "defendants," and added the third sentence; and made stylistic changes throughout the section.

Compiler's Notes. — This rule is similar to Rule 17, F.R.C.P.

Cross-References. — Guardians, § 75-5-101 et seq.

Service of process, Rule 4.

Tab T

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NOTES TO DECISIONS

ANALYSIS

Action barred.

—Plaintiffs not shareholders at time of wrongful act.

Shareholders' action against former corporate directors and officers for alleged conversion of corporate assets and for breach of fiduciary duties was barred by this rule where the shareholders did not acquire their stock until after the events complained of and the shares did not devolve on them by operation of law. Noland v. Barton, 741 F.2d 315 (10th Cir. 1984).

Class action distinguished.

Action by corporate shareholders which alleged injury to the corporation only, and not to them as individuals, was a derivative action and could not be brought as a class action. Richardson v. Arizona Fuels Corp., 614 P.2d 636 (Utah 1980).

COLLATERAL REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d Corporations § 2250.

C.J.S. — 18 C.J.S. Corporations §§ 564 to 566.

A.L.R. — Communications by corporation as privileged in stockholders' action, 34 A.L.R.3d 1106.

Allowance of punitive damages in stockholder's derivative action, 67 A.L.R.3d 350.

Application to derivative actions for breach of fiduciary duty, under § 36(b) of Investment Company Act of 1940 (15 USC § 80a-35(b)), of requirement, stated in Rule 23.1 of the Federal Rules of Civil Procedure that complaint in derivative actions allege what efforts were made by shareholders to obtain desired action or reasons for failure to do so, 65 A.L.R. Fed. 542.

Key Numbers. — Corporations ⇐ 206, 207.

Rule 24. Intervention.

(a) **Intervention of right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(Amended effective Jan. 1, 1987.)

Tab U

EXHIBIT U

shall direct the officer to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(e) **Filing transcript of satisfaction in other counties.** When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.

Compiler's Notes. — There is no federal rule covering this subject matter.

NOTES TO DECISIONS

ANALYSIS

Court.
—Duty.
——Attachment.
Effect.
—Acceptance of full payment.
Owner or attorney
—Vacation of satisfaction.
——Hearing.

Court.

—Duty.

——Attachment.

Court had duty to make order directing partial satisfaction of judgment to extent of money collected through attachment proceeding. Blake v. Farrell, 31 Utah 110, 86 P. 805 (1906).

Effect.

—Acceptance of full payment.

When plaintiff voluntarily accepted full payment of a judgment in his favor, the satisfaction and discharge operated to satisfy and discharge everything merged in and adjudicated by the judgment. Sierra Nev. Mill Co. v Keith O'Brien Co., 48 Utah 12, 156 P. 943 (1916).

Owner or attorney.

—Vacation of satisfaction.

——Hearing.

The recorded satisfaction of judgment signed by judgment creditor cannot be vacated without action and hearing in equity, and the lien of an attorney against the proceeds of the judgment does not include his personal right to execute against the judgment debtor. Utah C V. Fed Credit Union v. Jenkins, 528 P.2d 1187 (Utah 1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments § 979 et seq.
C.J.S. — 49 C.J.S. Judgments §§ 574 to 584.
A.L.R. — Voluntary payment into court of judgment against one joint tort-feasor as release of others, 40 A.L.R.3d 1181.
Key Numbers. — Judgment ⇐ 891 to 899.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Compiler's Notes. — This rule is similar to Rule 59, F.R.C.P.

Cross-References. — Fee for filing motion for new trial, § 21-2-2.

Harmless error not ground for new trial, Rule 61.

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

NOTES TO DECISIONS

ANALYSIS

Tab V

EXHIBIT 

Key Numbers. — New Trial ⇐ 13 et seq., 110, 116.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Compiler's Notes. — This rule is similar to Rule 60, F.R.C.P.

Cross-References. — Fee for filing motion to set aside judgment, §§ 78-3-16.5, 78-4-24, 78-6-14; Appx. D, Code of Judicial Administration.

NOTES TO DECISIONS

ANALYSIS

Tab W

EXHIBIT W

Rule 4-504. Written orders, judgments and decrees.

Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.

Applicability:

This rule shall apply to all civil proceedings in courts of record except small claims.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) Except where otherwise ordered, all judgments and decrees shall contain the address or the last known address of the judgment debtor and the social security number of the judgment debtor if known.

(7) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

(10) Nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.
(Amended effective January 15, 1990; April 15, 1991.)

Amendment Notes. — The 1990 amendment inserted "civil proceedings in" and "except small claims" under "Applicability" and made minor stylistic changes in the Statement of the Rule.

The 1991 amendment added the final sentence to the Intent paragraph, deleted "and not of record" following "courts of record" in the Applicability paragraph, and added Subdivision (10).

Rule 4-505. Attorneys' fees affidavits.

Intent:

To establish uniform criteria and a uniform format for affidavits in support of attorneys' fees.

Applicability:

This rule shall govern the award of attorneys' fees in the trial courts.

Statement of the Rule:

(1) Affidavits in support of an award of attorneys' fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorneys' fees are claimed, and affirm the reasonableness of the fees for comparable legal services.

(2) The affidavit must also separately state hours by persons other than attorneys, for time spent, work completed and hourly rate billed.

(3) If judgment is being taken by default for a principal sum which it is expected will require considerable additional work to collect, the following phrase may be included in the judgment after an award consistent with the time spent to the point of default judgment, to cover additional fees incurred in pursuit of collection:

> "AND IT IS FURTHER ORDERED THAT THIS JUDGMENT SHALL BE AUGMENTED IN THE AMOUNT OF REASONABLE COSTS AND ATTORNEY'S FEES EXPENDED IN COLLECTING SAID JUDGMENT BY EXECUTION OR OTHERWISE AS SHALL BE ESTABLISHED BY AFFIDAVIT."

(4) Judgments for attorney's fees should not be awarded except as they conform to the provisions of this rule and to state statute and case law.
(Amended effective January 15, 1990.)

Amendment Notes. — The 1990 amendment inserted "be filed with the court and" in Subdivision (1), deleted the former Subdivision (2), requiring descriptions of fee arrangements *other than hourly rates*, added the designation (2) to the former last sentence of Subdivision (1), and in Subdivision (4) inserted the subdivision designation and the phrase beginning "and" at the end.

TAB X

EXHIBIT X

ment would in effect be a reversal of the judgment and contrary to principle.[7] It has even been held that money paid on a void judgment may not be recovered where the payment was voluntary, but under a misapprehension as to the legal rights involved.[8] But there is authority that where money has been paid under a judgment the execution of which would be enjoined if no payment had been made, restitution may be granted in equitable proceedings directly attacking the judgment.[9]

As to a recovery from a clerk of court or his surety, it has been held that the failure of a clerk to enter upon the docket of a judgment the fact of payment, as required by statute, when the money is paid to him under statutory authority, leaves the title to the money in the judgment debtor, so that in case of its misappropriation by the clerk, the debtor has a valid claim against his surety. In such case, the death of the clerk prior to the discovery of the default does not defeat the claim.[10] On the other hand, there is authority that an action for restitution does not lie against any officer who, acting in good faith and in conformity with process which, although invalid, is fair on its face, has received payment and has paid it over to the person specified in the process.[11]

B. Setoff of Judgments

1. In General

§ 999. Generally.[12]

The satisfaction of a judgment may be wholly or partly produced by compelling the judgment creditor to accept in payment a judgment to which he is subject,[13] since it is a general rule that when mutual claims of parties have passed into judgments, one judgment may be set off against the other.[14]

7. De Medina v Grove, 10 QB 172, 116 Eng Reprint 67 (Ex Ch).

Annotation: 9 ALR 400.

In Royal Indem. Co v Sangor, 166 Wis 148, 164 NW 821, 9 ALR 397, it was held that money paid under a judgment rendered by a court of competent jurisdiction may not be recovered simply because it is afterward discovered not to be due.

A person who has conferred a benefit upon another by complying with a judgment, or whose property has been taken thereunder, is not entitled to restitution while the judgment remains valid and unreversed, merely because it was improperly obtained, except in a proceeding in which the judgment is directly attacked. Restatement, Restitution § 72(1).

8. Boggs v Fowler, 16 Cal 559; Elston v Chicago, 40 Ill 514. See also Boas v Updegrove, 5 Pa 516.

Annotation: 53 ALR 949, 961.

9. Restatement, Restitution § 72(2). See also § 73(1).

10. State ex rel Gilmore v Walker, 195 NC 460, 142 SE 579, 59 ALR 53.

11. Restatement, Restitution § 73(2).

12. As to equitable relief from a judgment for the purpose of permitting a setoff, see § 868, supra.

As to the effect of an attorney's lien on a judgment on the right of setoff, see 7 Am Jur 2d, Attorneys at Law § 290.

13. Verry v Barnes, 154 Minn 252, 191 NW 589, 31 ALR 707 (holding that if a judgment debtor wishes to avail himself of the right to have his judgment against the judgment creditor treated as payment pro tanto, he should apply to the court to have one judgment set off against the other, and not levy on the judgment against himself); Zinn v Dawson, 47 W Va 45, 34 SE 784.

14. Scott v Rivers (Ala) 1 Stew & P 24; Coonan v Loewenthal, 147 Cal 218, 81 P 527; Porter v Liscom, 22 Cal 430; Skrine v Simmons, 36 Ga 402; Puett v Beard, 86 Ind 172; Benson v Haywood, 86 Iowa 107, 53 NW 85; Ballinger v Tarbell, 16 Iowa 491; Alexander v Clarkson, 100 Kan 294, 164 P 294; Jeffries v Evans, 45 Ky (6 B Mon) 119; Collins v Campbell, 97 Me 23, 53 A 837; Smith v Washington Gaslight Co. 31 Md 12; Verry v Barnes, 154 Minn 252, 191 NW 589, 31 ALR 707; Hunt v Conrad, 47 Minn 557, 50 NW 614; Tice v Fleming, 173 Mo 49, 72 SW 689; Hovey v Morrill, 61 NH 9; Chandler v Drew, 6 NH 469; Murray v Skirm, 73 NJ Eq 374, 69 A 496; De Camp v Thomson, 159 NY 444, 54 NE 11; Cleveland v McCanna, 7 ND 455, 75 NW 908; Barbour v National Exch. Bank, 50 Ohio St 90, 33 NE 542; Johnson v Noble, 179 Okla 256, 65 P2d 502, 121 ALR 474; Johnson v Johnston, 123 Okla 203, 254 P 494, 51 ALR 1265; Whelan v McMahan, 47 Or 37, 82 P 19; Leitz v Hohman, 207 Pa 289, 56 A 868; Thropp v Susquehanna Mut. F. Ins. Co. 125 Pa 427, 17 A 473; Simmons v Reid, 31 SC 389, 9 SE 1058; Zinn v Dawson, 47 W Va 45, 34 SE 784.

Annotation: 121 ALR 478, 480.

§ 1000. Jurisdiction and authority of courts.

Although in some jurisdictions the matter of setoff as between judgments is materially affected[15] or expressly authorized by statute,[16] it is less dependent upon statute than is the jurisdiction to order setoffs generally,[17] and courts do have jurisdiction in cases of setoff independent of statute.[18] Indeed, the authority to set off one judgment against another is ancient and well established[19] under principles of common law,[20] as an inherent power of the court.[1] The exercise of the power depends mainly on the general jurisdiction of the court over suitors,[2] process,[3] and judgments.[4]

It is the modern view that although the right to offset judgments is of an equitable nature, courts of law may exercise the right.[5] Thus, the right to set off one judgment against another may be exercised in courts of law.[6] This rule has even been applied as to judgments rendered by different courts.[7] Thus, it is not necessary that the court to which the application is made have control over the judgment to be used as a setoff.[8]

As to the authority of appellate courts, although a setoff of one judgment

15. ***Annotation:*** 121 ALR 478, 480.

16. Cleveland v McCanna, 7 ND 455, 75 NW 908 (denying the setoff under the circumstances of the particular case).

Annotation: 121 ALR 478, 487.

In Blount v Windley, 95 US 173, 24 L Ed 424, it was held that the extent to which a right of setoff may be asserted against a judgment may be regulated by the legislature.

17. ***Annotation:*** 121 ALR 478, 479.

18. Scott v Rivers (Ala) 1 Stew & P 24; Puett v Beard, 86 Ind 172; Collins v Campbell, 97 Me 23, 53 A 837; Franklin Co. v Buhl Land Co. 264 Mich 531, 250 NW 299; Hovey v Morrill, 61 NH 9; Barbour v National Exch. Bank, 50 Ohio St 90, 33 NE 542; Ramsey's Appeal (Pa) 2 Watts 228; Simmons v Reid, 31 SC 389, 9 SE 1058; Citizens Industrial Bank v Oppenheim (Tex Civ App) 118 SW2d 820, error dismd; Zinn v Dawson, 47 W Va 45, 34 SE 784.

Annotation: 121 ALR 478, 485.

19. Franklin Co. v Buhl Land Co. 264 Mich 531, 250 NW 299; Barbour v National Exch. Bank, 50 Ohio St 90, 33 NE 542; Ramsey's Appeal (Pa) 2 Watts 228.

20. Franklin Co. v Buhl Land Co. 264 Mich 531, 250 NW 299; Barbour v National Exch. Bank, 50 Ohio St 90, 33 NE 542; Simmons v Reid, 31 SC 389, 9 SE 1058.

1. Puett v Beard, 86 Ind 172; Franklin Co. v Buhl Land Co. 264 Mich 531, 250 NW 299; Barbour v National Exch. Bank, 50 Ohio St 90, 33 NE 542; Leitz v Hohman, 207 Pa 289, 56 A 868.

2. Scott v Rivers (Ala) 1 Stew & P 24; Coonan v Loewenthal, 147 Cal 218, 81 P 527; Porter v Liscom, 22 Cal 430; Puett v Beard, 86 Ind 172; Franklin Co. v Buhl Land Co. 264 Mich 531, 250 NW 299; Barbour v National Exch. Bank, 50 Ohio St 90, 33 NE 542.

Annotation: 121 ALR 478, 485.

3. Scott v Rivers (Ala) 1 Stew & P 24; Porter v Liscom, 22 Cal 430; Franklin Co. v Buhl Land Co. 264 Mich 531, 250 NW 299.

Annotation: 121 ALR 478, 485.

4. Coonan v Loewenthal, 147 Cal 218, 81 P 527.

Annotation: 121 ALR 478, 485.

5. La Fleur v Schiff, 239 Miss 206, 58 NW 2d 320.

6. Murray v Skirm, 73 NJ Eq 374, 69 A 496; Ramsey's Appeal (Pa) 2 Watts 228.

Annotation: 121 ALR 478, 488.

7. § 1008, infra.

8. Schautz v Kearney, 47 NJL 56.

Annotation: 121 ALR 478, 505–507.

against another has been refused by a court on the ground that its jurisdiction was essentially appellate in character,[9] other appellate courts have in fact granted a setoff as between judgments.[10]

§ 1001. — Courts of equity.

The right to set off one judgment against another may be exercised in courts of equity.[11] Indeed, jurisdiction to order a setoff as between judgments was originally exercised exclusively by courts of equity,[12] and even today there are cases where a court of equity will allow a setoff of judgments, where a court of law would not do so.[13] The latter rule is particularly applicable where the judgments involved were rendered by different courts.[14]

On the question whether a court of equity will exercise its jurisdiction to set one judgment off against another in a case in which such relief could be obtained by motion in an action at law, there is a diversity of opinion.[15] In some cases, relief in equity is denied because of the adequacy of the remedy at law,[16] while in others, it is declared that the assumption of jurisdiction by courts of law did not oust the pre-established authority of courts of equity in those cases to which its extraordinary jurisdiction applied.[17]

§ 1002. Nature and purpose of remedy.

The right to set off one judgment against another is not generally statutory, but is an incident of the general jurisdiction of the court over its suitors and is of an equitable nature.[18] The power to set off one judgment against another is a remedy essentially equitable,[19] governed by equitable principles,[20] and in courts of equity such setoffs are allowed by the courts in the exercise of their equitable jurisdiction.[1]

The purpose of permitting a setoff as between judgments has been declared to be the avoidance of multiplicity of suits or circuity of actions,[2] and of needless

9. Tenant v Marmaduke, 44 Ky (5 B Mon) 76.

10. Irvine v Myers, 6 Minn 562, Gil 398; Sneed v Sneed, 82 Tenn (14 Lea) 13; Welsher v Libby, 107 Wis 47, 82 NW 693.
Annotation: 121 ALR 478, 491.

11. Hollomon v Humber, 180 Ga 470, 179 SE 365; Hovey v Morrill, 61 NH 9; Murray v Skirm, 73 NJ Eq 374, 69 A 496; Johnson v Noble, 179 Okla 256, 65 P2d 502, 121 ALR 474.
Annotation: 121 ALR 478, 489.

12. See Haskins v Jordan, 123 Cal 157, 55 P 786
Annotation: 121 ALR 478, 488.

13. Coonan v Loewenthal, 147 Cal 218, 81 P 527.
Annotation: 121 ALR 478, 489, 490.

14. § 1008, infra.

15. *Annotation:* 121 ALR 478, 490.

16. Whelan v McMahan, 47 Or 37, 82 P 19; Zinn v Dawson, 47 W Va 45, 34 SE 784.
Annotation: 121 ALR 478, 490.

17. Merrill v Souther, 36 Ky (6 Dana) 305.

18. La Fleur v Schiff, 239 Minn 206, 58 NW2d 320.
See also § 1000, supra.

19. Hovey v Morrill, 61 NH 9; Johnson v Noble, 179 Okla 256, 65 P2d 502, 121 ALR 474; Citizens Industrial Bank v Oppenheim (Tex Civ App) 118 SW2d 820, error dismd.

20. Collins v Campbell, 97 Me 23, 53 A 837; Hovey v Morrill, 61 NH 9; Murray v Skirm, 73 NJ Eq 374, 69 A 496; Johnson v Noble, 179 Okla 256, 65 P2d 502, 121 ALR 474; Leitz v Hohman, 207 Pa 289, 56 A 868.

1. Zinn v Dawson, 47 W Va 45, 34 SE 784.

2. Johnson v Noble, 179 Okla 256, 65 P2d 502, 121 ALR 474.
Annotation: 121 ALR 478, 498.

expenses or costs[3] incident to the issuance and levy of executions in favor of the respective parties.[4]

The setoff of judgments is sometimes regarded as distinct from the setoff of claims not reduced to judgment, and as standing upon entirely different grounds.[5] But there is other authority that the setoff of judgments is not different from the setoff of claims not reduced to judgment, and that the basis of the right to set off judgments is not different from the right to set off mutual claims of any kind.[6] An action to compel a defendant to allow the plaintiff's judgment to be set off against one held by the defendant has been regarded as an action on such judgment.[7]

§ 1003. Allowance as matter of right or discretion.

Although there are cases in which it is indicated that a setoff as between judgments is a matter of right,[8] and this result is sometimes reached under applicable statutory provisions,[9] the rule, according to a number of cases, is that the exercise of the jurisdiction to set off one judgment against another is not demandable of right but is discretionary with the court.[10] It is held that the setoff of one judgment against another is not a matter of right,[11] but of grace,[12] confined to the sound discretion of the court to which the application is made.[13] The discretion of the court in allowing or denying a setoff as between judgments is not an arbitrary[14] but a judicial one.[15]

3. Johnson v Noble, supra.

4. Martin County Nat Bank v Bird, 92 Minn 110, 99 NW 780; McAdams v Randolph, 42 NJL 332.
Annotation: 121 ALR 478, 498.

5. See Brown v Warren, 43 NH 430.
Annotation: 121 ALR 478, 479.

6. Odom v Attaway, 173 Ga 883, 162 SE 279; Benson v Haywood, 86 Iowa 107, 53 NW 85.
Annotation: 121 ALR 478, 479.

7. Dieffenbach v Roch, 112 NY 621, 20 NE 560.

8. Scott v Rivers (Ala) 1 Stew & P 24; Haskins v Jordan, 123 Cal 157, 55 P 786.
Annotation: 121 ALR 478, 491.

9. Ex parte Cooper, 212 Ala 501, 103 So 474; Hurst v Sheets, 21 Iowa 501.
Annotation: 121 ALR 478, 492.

10. La Fleur v Schiff, 239 Minn 206, 58 NW2d 320; Verry v Barnes, 154 Minn 252, 191 NW 589, 31 ALR 707; Alexander v Durkee, 112 NY 655, 19 NE 514; Spokane Secur. Finance Co. v Bevan, 172 Wash 418, 20 P2d 31.
Annotation: 121 ALR 478, 492.

Even though an order granting a setoff against a decree for dower might legally be made, an application therefor is addressed to the discretion of the court, and if injustice would result by allowing the setoff, it should be refused. Needles v Dougherty, 134 NJ Eq 108, 31 A2d 396.

11. Verry v Barnes, 154 Minn 252, 191 NW 589, 31 ALR 707; Needles v Dougherty, 134 NJ Eq 108, 34 A2d 396; De Camp v Thomson, 159 NY 444, 54 NE 11; Leitz v Hohman, 207 Pa 289, 56 A 868; Thropp v Susquehanna Mut. F. Ins. Co. 125 Pa 427, 17 A 473.

12. Scott v Rivers (Ala) 1 Stew & P 24; Needles v Dougherty, 134 NJ Eq 108, 34 A2d 396; Thropp v Susquehanna Mut F. Ins. Co. 125 Pa 427, 17 A 473.

13. Verry v Barnes, 154 Minn 252, 191 NW 589, 31 ALR 707; Hovey v Morrill, 61 NH 9; Murray v Skirm, 73 NJ Eq 374, 69 A 496; De Camp v Thomson, 159 NY 444, 54 NE 11; Barbour v National Exch. Bank, 50 Ohio St 90, 33 NE 542; Montalto v Yeckley, 73 Ohio App 480, 29 Ohio Ops 144, 57 NE2d 144, affd 143 Ohio St 181, 28 Ohio Ops 107, 54 NE2d 421; Johnson v Noble, 179 Okla 256, 65 P2d 502, 121 ALR 474; Leitz v Hohman, 207 Pa 289, 56 A 868; Simmons v Reid, 31 SC 389, 9 SE 1058; Black v Whitewater Commercial & Sav. Bank, 188 Wis 24, 205 NW 404.
Annotation: 121 ALR 478, 492.

14. Murray v Skirm, 73 NJ Eq 374, 69 A 496.
Annotation: 121 ALR 478, 495.

15. Leitz v Hohman, 207 Pa 289, 56 A 868.